IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

NO. ..... 76-622

JOHNSON BRONZE COMPANY,
Petitioner,

v.

ANGELINE R. OSTAPOWICZ,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CASES



OTHER



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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Johnson Bronze Company, Petitioner herein, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 27, 1976, as amended on September 29, 1976.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) and the amendment thereto (App. B, *infra*) have not yet been officially reported. They are set forth in the Appendix, as is the Court of Appeals' order denying rehearing (App. C, *infra*). The opinion of the district court is reported at 369 F. Supp. 522 (App. D, *infra*).

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## JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1976. Johnson Bronze Company's timely petition for rehearing was denied by the Court of Appeals on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## STATUTE INVOLVED

This case involves the interpretation and application of Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973), which is set forth in the Appendix (App. E, *infra*) and the same statute prior to the 1972 amendments thereto, 42 U.S.C. § 2000e-5(e) (1970) (App. F, *infra*).

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## QUESTIONS PRESENTED

1. Whether, in an employment discrimination case brought under Title VII of the Civil Rights Act of 1964, as amended, the defendant, contrary to this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), must bear the burden of disproving plaintiff's prima facie case by a preponderance of the evidence.

2. Whether, in a private civil action brought under Title VII of the Civil Rights Act of 1964, as amended, plaintiff may raise allegations contained in charges which she filed with the Equal Employment Opportunity Commission ("EEOC") subsequent to the charge upon which the action is jurisdictionally premised (1) where said allegations were not within the scope of the original charge, and (2) in the absence of a showing that the EEOC either issued a right to sue letter concerning the later charges or contemplated the later charges in its processing of the original charge.

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## STATEMENT

This action was brought by Angeline R. Ostapowicz as a private civil class action against Johnson Bronze Company. The suit alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

On April 11, 1968, Local 69 of the United Automobile Aerospace and Agricultural Implement Workers of America ("Union") filed a charge with the Equal Employment Opportunity Commission ("EEOC"). The charge arose out of complaints by female members employed in the Shipping Department at the Johnson Bronze Company plant in New Castle, Pennsylvania.

On August 6, 1970, following its investigation of the Union's Shipping Department charge, the EEOC found reasonable cause to believe that Johnson Bronze Company excluded females as a class from one of the job classifications in the Shipping Department, i.e., the "heavy packer" position.

On October 13 and 27, 1970, Angeline R. Ostapowicz filed charges with the EEOC alleging, *inter alia,* that Johnson Bronze Company had discriminated against her by excluding women from certain jobs in the Machine Shop at the Company's plant.

On March 29, 1971, the EEOC issued, to all female members of the Union, a "right to sue" notice concerning the Union's 1968 Shipping Department charge.

On April 28, 1971, upon receipt of the notice of right to sue on the Union's charge, Ostapowicz filed this civil class action in the United States District Court for the Western District of Pennsylvania.



On May 11, 1971, the EEOC, without engaging in an investigation or conciliation of the Machine Shop charges filed by Ostapowicz, issued right to sue letters to Ostapowicz on those Machine Shop charges.

On May 14, 1971, Plaintiff filed an amendment to her complaint in her civil action. The amendment attempted to include the Machine Shop allegations within the scope of the civil action previously filed concerning the Union's Shipping Department charge. The District Court approved the amendment.

Following a trial on the merits, the District Court held that Johnson Bronze had not successfully rebutted the prima facie case presented on behalf of Ostapowicz and the plaintiff class.

The amount of damages awardable to the class members was determined by a special master and eventully approved by the District Court.

Johnson Bronze appealed the District Court's liability and damages determinations to the United States Court of Appeals for the Third Circuit. The Third Circuit upheld the District Court except insofar as the relief granted included hiring quotas.

On appeal Johnson Bronze Company argued, *inter alia,* that the District Court erred by (1) misapplying the burden of proof for employment discrimination cases as established in ***McDonnell Douglas Corp. v. Green,*** 411 U.S. 792 (1973) and (2) concluding that the Court had subject matter jurisdiction over Ostapowicz's allegations concerning the Machine Shop.

The Third Circuit rejected these two arguments stating that (1) under ***McDonnell Douglas Corp v.***

*Green* a defendant in an employment discrimination suit must disprove plaintiff's prima facie case by a preponderance of the evidence (App. B., *infra* at pp. 19a-20a), and (2) the District Court had jurisdiction over the Machine Shop allegations merely because Ostapowicz had filed Machine Shop charges prior to the conciliation of the Union's Shipping Department charge (App. A, *infra* at pp. 10a-11a).

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## REASONS FOR GRANTING THE WRIT

### 1. The Burden of Proof Rule Adopted by the Court of Appeals Conflicts With the Prior Holding of This Court in McDonnell Douglas Corp. v. Green.

This Court should grant the instant Petition because the Court of Appeals has misstated and misapplied this Court's rule for allocation of burden of proof in employment discrimination cases.

In rejecting Johnson Bronze Company's burden of proof argument the Court of Appeals held:

> ". . . once a prima facie case of a Title VII violation has been established, the burden shifts to the defendant to articulate legitimate nondiscriminatory reasons for the unequal treatment shown in the prima facie case. The defendant must prove its justification by a preponderance of the evidence."[1]

The rule stated thusly departs from the rule previously established by this Court. In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court set up a three part burden of proof for Title VII actions:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of race discrimination.
>
> * * *
>
> "The burden then must shift to the employer to articulate some legitimate nondiscriminatory reason for the [facts encompassing plaintiff's prima facie showing].

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1. Order Amending Opinion, App. B, *infra* at p. ..... The Court of Appeals' discussion of the burden of proof was altered slightly in response to Johnson Bronze Company's Petition for Rehearing. *Compare* App. A, *infra* at p. 11a, *with* App. B, *infra* at pp. 19a-20a.

> "[The complainant must] be afforded a fair opportunity to show that petitioner's stated reason for [the facts encompassed by plaintiffs prima facie showing] was pretext."

411 U.S. at 802-04.

It is clear that the burden of proof rule adopted by the Court of Appeals in this case significantly alters the rule adopted in *McDonnell Douglas.*[2]

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2. The Court of Appeals cited two of its own decisions and one decision of this Court in support of its holding.

The two Third Circuit decisions, *United States v. International Union of Elevator Constructors,* ..... F.2d ....., (No. 75-2134, 3d Cir. July 21, 1976) and *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 259 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975), indicate that the burden of proof rule has been misstated by the Third Circuit prior to the instant case. The fact that the Court of Appeals has been wrong in the past does not diminish the importance of the issue which Petitioner is asking this Court to decide. To the contrary, it shows the necessity of reviewing this case before the misstatement of the burden of proof becomes entrenched in the Third Circuit or spreads to the case law of other circuits.

The opinion of this Court cited by the Court of Appeals is *Franks v. Bowman Transportation Co.,* ..... U.S. ....., 44 U.S.L.W. 4356 (U.S. March 24, 1976). First, the discussion apparently referred to, (44 U.S.L.W. at 4363 & n. 32), is dictum. Second, the discussion relates to the establishment of an individual right to relief by an individual class member after a discriminatory employment practice had already been proved; the question involved in the instant case deals with the initial question, i.e., whether the defendant was guilty of a discriminatory employment practice. Third, to the extent that the discussion in *Franks* conflicts with the burden of proof rule set out in *McDonnell Douglas,* it must be viewed as incorrect.



A comparison of the two rules points up the significant difference. Under both the *McDonnell Douglas* rule and the rule adopted by the Court of Appeals, a Title VII plaintiff must first establish a prima facie case.[3] After the establishment of the prima facie case, however, the two rules diverge. Under *McDonnell Douglas,* the plaintiff may recover on the basis of the prima facie case alone if the defendant offers no explanation for the prima facie case. If the defendant offers an explanation, however, plaintiff must show that the explanation is pretext in order to recover. Under the rule adopted by the Court of Appeals, plaintiff recovers if defendant cannot disprove the prima facie case by a preponderance of the evidence. The response of the defendant to plaintiff's prima facie case is different under each rule. Under *McDonnell Douglas,* the defendant need only articulate a legitimate explanation, whereupon it becomes the burden of the plaintiff to prove that the explanation is pretext. Under the rule adopted by the Court of Appeals, the defendant must not only articulate its legitimate explanation but must also prove the explanation by a preponderance of the evidence.

The Court of Appeals adopted a two part burden of proof whereas this Court's *McDonnell Douglas* rule in-

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3. The elements of the prima facie case were detailed in the *McDonnell Douglas* case. This Court recently has granted certiorari in *Rodriquez v. East Texas Motor Freight System, Inc.,* 505 F.2d 40 (5th Cir. 1974), *cert. granted,* ..... U.S. ....., 44 U.S.L.W. 3670 (U.S. May 24, 1976). One of the issues to be heard in that case relates to the elements of a prima facie case. Petitioners believes that it would be appropriate to grant the instant Petition dealing with the burden of proof holding in *McDonnell Douglas* to concurrently clarify the burden of proof and the prima facie case questions in Title VII cases.

volves a three part burden. The Court of Appeals' rule effectively eliminates the third part of the *McDonnell Douglas* scheme for burden of proof, i.e., plaintiff's burden to show that the legitimate non-discriminatory explanation of the prima facie case offered by defendant is pretext. The opinion of the Third Circuit thus places an unduly heavy burden on defendants in employment discrimination cases.[4] It also renders the plaintiff's burden in such cases ridiculously light.

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4. The current burden of proof controversy is easily discussed in terms of the difference between the burden of persuasion and the burden of proceeding with the evidence. Under the *McDonnell Douglas v. Green* rule, the burden of going forward with the evidence shifts to defendant upon the establishment of plaintiff's prima facie case—the burden of persuasion on the existence of a Title VII violation, however, remains with the plaintiff. Under the decision of the Third Circuit, once a prima facie case has been established, the defendant must bear the burden of persuasion on the absence of a Title VII violation. This is not only contrary to this Court's holding in *McDonnell Douglas Corp. v. Green,* but it is also contrary to traditional notions of jurisprudence, i.e., that a plaintiff normally bears the burden of persuasion in establishing a right to recovery. *See Causey v. Ford Motor Co.,* 516 F.2d 416, 421 & n. 6 (5th Cir. 1975); *Bittar v. Air Canada,* 512 F.2d 582 (5th Cir. 1975); *Gilmore v. Kansas City Terminal Ry.,* 509 F.2d 48, 52 (8th Cir. 1975); *Franklin v. Troxel Mfg. Co.,* 501 F.2d 1013 (6th Cir. 1974). *See also Sabbatino v. Curtiss Nat'l Bank,* 446 F.2d 1046, 1055 (5th Cir. 1971); *McCormick, Handbook of the Law of Evidence,* § 336 (Cleary ed. 1972).

Because the Third Circuit's decision places the ultimate burden of persuasion by a preponderance of the evidence upon defendant, it creates a conflict with the Fifth Circuit's decision in *Causey, supra.* The instant Petition should be granted by reason of that conflict.



In *McDonnell Douglas* this Court held that plaintiff had established a prima facie case of race discrimination arising out of defendant's refusal to hire plaintiff. The Court also held that defendant had carried its burden by articulating a legitimate reason for refusing to hire plaintiff, i.e., plaintiff's prior unlawful conduct. Finally, the Court held that plaintiff should be given the opportunity to show that defendant's decision not to hire him was not based on the articulated reason, i.e., that plaintiff's unlawful conduct was merely a pretext used by defendant to obscure its discriminatory intent.

With respect to the statement of the *McDonnell Douglas* rule by the Court of Appeals in this case, two factors should be noted. First, this Court did not hold that defendant had to *prove,* by a preponderance of the evidence or otherwise, that the reason for its refusal to hire plaintiff was plaintiff's prior unlawful conduct; this Court held that defendant need only articulate a legitimate reason for its conduct. Second, this Court held that the opportunity must be given to plaintiff to disprove (i.e., show as pretext) defendant's articulated reason for not hiring plaintiff. Neither of these two factors comports with the Court of Appeals' holding that upon establishment of a prima facie case a defendant must prove by a preponderance of the evidence that plaintiff's prima facie showing is due to nondiscriminatory reasons.

The question posed in the present litigation involves what the District Court in *McDonnell Douglas Corp. v. Green* should have done on remand. Pursuant to this Court's holding, the District Court should have given Green the opportunity to prove that McDonnell Douglas' refusal to hire him was not based on his unlawful conduct. Pursuant to the Third Circuit's holding in this

case, on remand in *McDonnell Douglas* the employer should have borne the burden of proving by a preponderance of the evidence that its refusal to hire Green was based on his unlawful conduct, not upon his race—a significantly greater burden than that anticipated by this Court.

Johnson Bronze Company argued on appeal that the District Court erred in not finding that the Company had articulated a legitimate explanation for plaintiff's prima facie showing. By requiring proof by a "preponderance of the evidence" rather than requiring merely an articulation of a legitimate reason, the Court of Appeals, like the District Court, failed to address Johnson Bronze Company's burden of proof argument in the terms dictated by this Court in the *McDonnell Douglas* case.

The erroneous allocation of the burden of proof by the courts below resulted in an incorrect finding of liability in the instant case.[5] More importantly, however,

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5. The "preponderance rule" adopted by the Court of Appeals significantly impacted the liability determination against Johnson Bronze Company. For example, determination of liability was based in part on plaintiff's showing that "[i]n 1970 a man was made a mail clerk while many women with greater seniority were laid off." (App. A, *infra* at p. 6a) Assuming that this fact established a prima facie case of sex discrimination, Johnson Bronze Company submitted evidence which showed that (1) there was only one mail clerk position at the Company, (2) no females had applied for the position, and (3) the mail clerk position was not within the bargaining unit and therefore the appointment was not governed by seniority. Under the *McDonnell Douglas* standard, Johnson Bronze had thereby articulated a legitimate explanation for the appointment of the male to the mail clerk position, i.e., the statistical insignificance of the singular position combined with the irrelevancy of seniority to that appointment. Under the rule adopted



the Court of Appeals' not so subtle alteration of the *McDonnell Douglas* rule for burden of proof will seriously impact all current and future Title VII litigation.

The rule for allocation of burden of proof is a matter of utmost importance to all litigants under Title VII of the Civil Rights Act of 1964. Any confusion over the interpretation of this Court's holding in *McDonnell Douglas Corp. v. Green* should be resolved with dispatch. It is thus appropriate, indeed necessary, that this Court grant the instant Petition for Writ of Certiorari.

**2. The Scope of the Civil Action Approved by the Court of Appeals Exceeded That Permissible Under Title VII and Numerous Circuit Court Holdings.**

This Court should grant the instant Petition because the Court of Appeals erroneously decided an important question of federal law which has not been, yet should be, settled by this Court.

In rejecting Johnson Bronze Company's jurisdictional argument the Court of Appeals held that the scope of a private civil action under Title VII of the Civil Rights Act of 1964 may properly include allegations of discrimination made in charges filed subsequent to the

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5. (Cont'd.)
by this Court, however, Johnson Bronze had not discharged its burden of *proving by a preponderance of the evidence* that the selection of a male for the mail clerk position was not a product of sex discrimination. Under the preponderance rule Johnson Bronze has been held liable for failure to carry its burden; under the *McDonnell Douglas* rule, however, the Company's articulation of the legitimate explanation shifted the burden to plaintiff to show that defendant's explanation was pretext, a burden which was not undertaken or carried by plaintiff.

charge upon which the civil action is jurisdictionally founded despite the absence of a showing that the EEOC had taken any action with respect to the subsequent charges.

A brief recounting of the pertinent facts is necessary to an understanding of this reason for granting the instant Petition. In 1968, Ostapowicz's union filed a sex discrimination charge against Johnson Bronze Company. The charge related to employment practices in the Company's Shipping Department. The EEOC's investigation related to practices in the Shipping Department only, and in August 1970 the EEOC determined that there was reasonable cause to believe that the Company had discriminated in its Shipping Department.

In October and November 1970, plaintiff Ostapowicz filed charges with the EEOC alleging sex discrimination in the Company's Machine Shop.

Conciliation of the 1968 Shipping Department charge and the August 1970 Shipping Department reasonable cause determination was attempted by the EEOC. These conciliation efforts failed and in March 1971 Ostapowicz received a right to sue notice from the EEOC on the 1968 Shipping Department charge. Ostapowicz then filed her court action. At the time suit was filed, Ostapowicz had not received from the EEOC right to sue notices for her 1970 Machine Shop charges.[6]

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6. Subsequently, Ostapowicz received right to sue letters in her 1970 charges and amended her civil complaint to incorporate them. The Court of Appeals, however, never reached Johnson Bronze Company's challenge to the validity of the amendment because of its holding that the Machine Shop allegations were properly within the scope of the Complaint as originally filed.



These Machine Shop charges had not been investigated by the EEOC, nor had the Company ever been notified of the charges. Further, and most importantly, the record does not reflect that these 1970 Machine Shop charges had been considered in the EEOC's conciliation efforts which had been taken place concerning the Shipping Department charge.

Title VII is designed to afford the EEOC the first opportunity to resolve employment discrimination disputes and charging parties should not be permitted to avert the administrative process by resorting directly to the courts. By concluding that the District Court had jurisdiction over allegations of discrimination in the Machine Shop when the original complaint was filed, the Court of Appeals in effect short-circuited the EEOC's opportunity to resolve the Machine Shop allegations and sanctioned Ostapowicz's avoidance of the administrative process.

The courts of appeals which have considered the question of the scope of the Title VII civil action vis a vis the administrative proceedings which preceded it have limited the scope of the civil court action. The limitation is appropriate to avoid burdening the courts with controversies which could have been resolved through the administrative process.

The Fifth Circuit has been the leading court in setting the parameters of a civil action based on an EEOC charge. The generally accepted rule was declared in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The Court held that the civil action "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of the case before the Commission," and also that the civil

action should be limited to the scope of the EEOC investigation which can "reasonably be expected to grow out of the charge of discrimination."

The Court of Appeals in the instant case held that the Machine Shop allegations "grew out of" the Shipping Department charge because the Machine Shop charges were filed during the pendency of the Shipping Department charge (App. A, *infra* at p. 10a). In the absence of record evidence that the EEOC considered the Machine Shop charges as growing out of the Shipping Department charges and thus attempted conciliation on those charges, the Third Circuit's holding below frustrates the purpose of Title VII, deprives the employer of the opportunity to conciliate, and fosters the avoidance of the administrative process.

The Court of Appeals' reliance upon the mere filing of the Machine Shop charges frustrates the conciliatory purpose of Title VII where, as here:

(1) no EEOC investigation of the Machine Shop charges had taken place;

(2) no EEOC reasonable cause determination upon those Machine Shop charges had been made;

(3) no EEOC conciliation efforts upon the Machine Shop charges had been attempted; and

(4) no EEOC right to sue letter had issued upon the Machine Shop charges.

A clearer avoidance of the administrative process and frustration of Title VII's purpose can hardly be imagined.

The consequences of the Third Circuit's decision are far reaching and extremely unreasonable. Assume that



an employer has one plant in New York and one in California. A sex discrimination charge is filed by a New York female employee at the New York local EEOC office. That charge is investigated by the New York EEOC office and reasonable cause is found concerning the New York plant. After the finding of reasonable cause on the New York charge, a female employee at the California plant files a sex discrimination charge at the local California EEOC office. The California office takes no action upon the latter charge. The New York office, completely unaware of the California charge, attempts to conciliate the New York charge, but fails. The New York office issues a right to sue notice on the New York charge. The New York charging party files a civil class action in New York including allegations of discrimination at the California plant. Pursuant to the decision below, the New York class action properly includes the California allegations because the California charge was filed during the pendency of the New York charge before the EEOC. The facts that (1) the California charge was never investigated, (2) the EEOC never reached a reasonable cause determination with respect to the California charge, (3) the EEOC never conciliated the California charge, and (4) the EEOC never issued a right to sue notice on the California charge, are apparently irrelevant under the decision below.

Johnson Bronze Company believes that this Court should review the decision below because of its far reaching and unreasonable consequences.

The prerequisites to filing a Title VII action are (1) the filing of a timely charge with the EEOC and (2) receipt of a statutory notice of a right to sue from the

EEOC. 42 U.S.C. § 2000e-5(e) (1970), *as amended,* 42 U.S.C. §2000e-5(f)(1) (Supp. III, 1973), (Apps. E & F, *infra*) (the controlling language of the statute remains the same after the 1972 amendment); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). Although Ostapowicz had filed charges concerning the Machine Shop she had not received a right to sue notice. Yet the Court of Appeals erroneously permitted her to raise in court issues as to which no right to sue letter had ever been received.

Another disturbing aspect of the decision below is its impact on the back pay period applicable to the claims of Ostapowicz and the class of female machine operators. Ostapowicz filed her Machine Shop charge in 1970. Had she filed a civil class action based merely on the 1970 charges, the two year back pay period would have extended only to 1968.[7] Because of the Court of Appeals' holding that her 1970 allegations were to be considered under the 1968 charge filed by the Union, Ostapowicz and the class of machine operators were gratuitously awarded an additional two years' back pay.

It should be noted that the jurisdictional argument made by Johnson Bronze Company in the Court of Appeals was not lightly rejected by the Court of Appeals in its August 27 opinion (App. A, *infra* at p. 8a). In fact, the Court noted that Johnson Bronze Company's position "has appeal" and that it has "some force" absent the filing of the 1970 charges by Ostapowicz (App. A, *infra* at p. 8a & 10a).

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7. Although the two year period was not literally applicable until 1972, the District Court and the Court of Appeals have sanctioned the use of the two year period in this case. (App. A, *infra* at p. 13a & n. 8).



Johnson Bronze Company respectfully submits that the mere filing of the 1970 Machine Shop charges is not sufficient to establish the District Court's jurisdiction over the original complaint's Machine Shop allegations and, for that reason, submits that this Court should grant the instant Petition for Certiorari.

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## CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## APPENDIX A

### Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2435

ANGELINE R. OSTAPOWICZ,
Plaintiff-Appellee

*v.*

JOHNSON BRONZE COMPANY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-404)

Argued June 22, 1976
Before: KALODNER, ADAMS and WEIS, *Circuit Judges.*

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### Opinion of the Court

(Filed August 27, 1976)

WEIS, *Circuit Judge.*

In a lengthy and stoutly contested class action, the district court turned aside a jurisdictional attack and determined that the defendant had been guilty of sex discrimination in its employment practices. The court ordered relief in the form of back pay and other measures designed to prevent future discrimination. Although we affirm in all other respects, the portion of the order establishing a hiring quota is vacated because of a lack of support in the record.[1]

The dispute centered on a contention that defendant Johnson Bronze Company had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Plaintiffs argued that the defendant had engaged in discrimination which resulted in women being laid off while men with less seniority were either retained or recalled at an earlier date.

Defendant manufactured bushings and bearings in a plant organized into ten divisions. Approximately one-half of the hourly workers were employed in Division 1, the machine shop comprised of some 225 machine centers. Most of the testimony was devoted to conditions existing there.

Each machine operation generally requires a "set-up" which entails placing fixtures and tools in the machine at proper positions, angles and distances so that the bushings or bearings produced comply with

1. The opinion of the district court determining liability is reported at 369 F. Supp. 522 (W.D. Pa. 1973).

exacting customer specifications. The ability to perform a "set-up" is an important factor in classifying a machine operator as first or second class. The first class operators set up the machines as well as operate them, but second class operators only run the machines, the set-up being performed by a machine setter. However, on occasion a machine setter will set up a first class operator's machine.

There were two means by which a second class operator could become first class: "bidding" or "bumping." In the former situation, if an opening for a first class operator occurred, employees could "bid" for the job, with seniority as the sole criterion. After a five-day qualifying period on the machine, the employee was required to demonstrate his ability to both set-up and operate the machine. In the latter, if an employee's job was eliminated, he could "bump" another employee who had less seniority and take his job. However, when a bump occurred, the bumping employee had to pass the test for becoming a first class operator immediately—no qualification period was allowed. Further, if, upon being laid off, an employee refused to bump a certain job, he could not be recalled to that position if an opening later occurred.

Qualification as a first class operator without experience was not possible. The company did not have a formal program for training second class operators to become first class, and an employee could only learn how to make the set-ups by watching machine setters, asking questions and attempting to do the work. The skills and experience an employee acquired working on one machine usually were not transferable to another mechanism. The machines were so diverse that one obtained the ability to become first class only on those which he had operated as a second class operator or which were related in their manner of operation.



The gravamen of Ostapowicz's allegations was that women were discriminated against because they were employed only as second class operators and were never promoted to first class. Although there was a slight difference in the wage scales for the two classifications, the major impact of the classification was felt when layoffs occurred. Under the collective bargaining agreement, the company was generally obliged to lay off second class operators before first class operators regardless of the individuals' seniority. Thus, a decline in business would affect a female before a male first class operator with far less seniority.

In April, 1968, the union which represented the employees filed a charge with the Equal Employment Opportunity Commission alleging that the company maintained sex-segregated job classifications which resulted in women being laid off while men with less seniority were both retained and recalled from layoffs before women. Attached to the charge, which was docketed at YCL9-079, was a grievance from a woman in the shipping department. The resulting investigation and EEOC findings were limited to the shipping department, and in August, 1970, the Commission found reasonable cause to believe that the allegations were true. Plaintiff Ostapowicz, who was not connected with the shipping department, filed two additional sex discrimination charges, TCL1-0558 and TCL1-0802, in October and November, 1970.

The EEOC conciliation efforts began in December, 1970 but were unsuccessful. On March 29, 1971 the Com-

mission sent "right-to-sue letters" to Ostapowicz and others referring to charge YCL9-079. Based on that letter, she instituted this action on April 27, 1971, within the then applicable thirty-day period. Without further investigation, on May 11, 1971, EEOC issued additional letters citing the charges filed in October and November, 1970, and Ostapowicz promptly amended her complaint to include them.

The district court certified the case as a class action[2] and found that plaintiffs established a prima facie case of discrimination. Finding that strength was not a determinative factor for positions in either the shipping department or Division 1, the court concluded that the company was hostile to women who wanted to become first class operators or heavy packers and had intimidated them at least to a degree.

The court detected a pattern of intentional discrimination. In 1970 a man was made a mail clerk while many women with greater seniority were laid off. Women had never been employed in five of defendant's ten divisions, and in 1965 and 1966 sixty-five men were hired in Division 1 and only one woman. Because of the decline in business, there were few bids open for first class positions, and women had to rely mainly on bumping to achieve that classification. However, their progress was hindered because they had not been given the opportunity to observe difficult set-ups being made and were thus deprived of the primary means of acquiring the necessary skills. Moreover, the court found that the first class test was subjective, not objective, and was administered entirely by men.

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2. We note that the definition of the class includes all past employees. On remand the district court should modify this determination so as to include only those whose claims were not time barred. *See Wetzel v. Liberty Mutual Ins., Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).



Out of an average of fifty women working in Division 1, only one had ever been made a first class operator although many had over twenty years' experience in the shop. Plaintiffs' statistical evidence showed that, because of the classification and recall system, many women were laid off while men with less seniority remained working.[3] Finally, machine setters, foremen and assistant foremen were recruited from first class operators and, therefore, women had been excluded from consideration for this additional advancement.

On these facts, the district court determined that the plaintiffs had established a prima facie case of discrimination. It rejected defendant's proffered justifications and ordered relief which included establishment of a training program administered by an outside agency; adjustment in seniority because of discriminatory layoffs; an affirmative action program including future hiring of males and females in equal numbers; and back pay. The last matter was referred to a magistrate for hearing and submission of findings of fact.

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3. The district court found, for example, that on May 25, 1971 there were twenty-six male first class operators who were junior in seniority to Ostapowicz working while she was laid off.

I.

Defendant contends that the district court lacked jurisdiction because the first right to sue letter upon which Ostapowicz relied cited the EEOC docket number of a charge applicable only to employees in the shipping division. The company argues that since the plaintiff was not a member of that department, she was not "aggrieved" by any discrimination occurring there and could not "piggyback" her claim onto the first letter. While defendant's position has appeal, we cannot accept it in the circumstances of this case.

The Equal Employment Opportunity Act's format provides that after a person claiming to be aggrieved files a charge with EEOC, the agency must notify the respondent and conduct an investigation. If, after the investigation, the Commission finds reasonable cause to believe that the charge is true, conciliation procedures are instituted. If the Commission is unable to resolve the matter informally, it notifies the aggrieved party of his right to file a civil action in the district court within ninety days.[4] 42 U.S.C. § 2000e-5.

The jurisdictional prerequisites to a suit under Title VII are the filing of charges with the EEOC and the receipt of the Commission's statutory notice of the right to sue. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). These preliminary steps are essential parts of the statutory plan, designed to correct discrimination through administrative conciliation and persuasion if possible, rather than by formal court action. While preliminary requirements for a Title VII action are to be interpreted in a nontechnical fashion, *Love v. Pullman*

4. At the time suit was filed, the relevant period was thirty days.



*Co.,* 404 U.S. 522 (1972); *Hackett v. McGuire Brothers, Inc.,* 445 F.2d 442 (3d Cir. 1971), the aggrieved person is not permitted to bypass the administrative process. Conciliation rather than formal court proceedings remains the preferred method of settling disputes. *Equal Emp. Op. Com'n v. E. I. duPont de Nemours & Co.,* 516 F.2d 1297 (3d Cir. 1975); *Fekete v. U. S. Steel Corp.,* 424 F.2d 331 (3d Cir. 1970).[5]

In order to comply with the spirit of the Act, there must be some limitation on suits in the district court so that the Commission will have the first opportunity to examine the allegations of discrimination. Courts have generally determined that the parameters of the civil action in the district court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, *Gamble v. Birmingham Southern R.R. Co.,* 514 F.2d 678 (5th Cir. 1975); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970), including new acts which occurred during the pendency of proceedings before the Commission, *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973).[6]

5. *See also* the Conference Report on the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7166, 7168 (1972).

6. Although EEOC must be given the opportunity, it is not necessary that it actually investigate and conciliate a charge before a right to sue letter is issued. *Fekete v. U.S. Steel Corp., supra,* Belton, Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments, 20 ST. LOUIS U. L.J. 225 (1976).

The original charge, YCL9-079, filed by the union on April 11, 1968, alleged that the employer had discriminated against female members of the bargaining unit. The grievance attached referred only to the shipping department, and the EEOC report of August, 1970 similarly was confined to that division. If this had marked the end of the EEOC's involvement, there would be some force to the defendant's contention that Ostapowicz could not bring herself within the scope of the EEOC charge and subsequent suit letter. However, the additional charges of sex discrimination filed by her in October and November, 1970, numbered TCL1-0558 and TCL1-0802, implicated the seniority rights of women in the machine shop division where she worked. It was after the filing of these additional charges that conciliation discussions and proposals took place between the Commission and the employer.

On March 19, 1971, after EEOC's settlement efforts had failed, it received a letter from Ostapowicz stating her desire, and that of other female employees, to sue the employer. She referred to charge YCL9-079, said she had testified in that case, and had also filed cases TCL1-0558 and TCL1-0802. The first right to sue letter was issued ten days later. Thus, before suit was instituted and before EEOC's role had been terminated, three separate charges had been filed, each alleging specific instances of the same form of sex discrimination by the same employer. The additional charges filed during the pendency of the administrative proceedings may fairly be considered explanations of the original charge and growing out of it.[7] Under these circumstances, we can-

7. The mere fact that the Commission assigned differing docket numbers to the various charges has no real significance since they all related to the same general charge originally filed.



not say that the district court erred in concluding that it had jurisdiction over the suit as originally filed and that it encompassed all the instances of sex discrimination. *See Gamble v. Birmingham Southern R.R. Co., supra. Cf. E.E.O.C. v General Electric Co.,* 532 F.2d 359 (4th Cir. 1976).

II.

The defendant contends that the district court erred in allocating the burden of proof and argues that plaintiff failed to prove sex discrimination or to rebut the company's articulated justifications. After careful review of the district court's opinion incorporating findings of fact and conclusions of law, we do not find reversible error.

The court cited *McDonnell Douglas Corp. v. Green, supra,* and carefully followed its guidelines in ruling on burden of proof at various stages of the case. The *McDonnell* case holds that once a prima facie case of a Title VII violation has been established, the burden shifts to the defendant to prove by a preponderance of the evidence that there are legitimate nondiscriminatory reasons for the unequal treatment shown in the prima facie case. *See also United States v. International Union of Elevator Constructors,* — F.2d — (No. 75-2134, 3d Cir. July 21, 1976); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

The district court held that the plaintiff had established a prima facie case of discrimination by the use of statistical evidence and other testimony. The judge included in his findings that:

> "A woman who desired to become first class was told by the personnel manager that she 'couldn't get

> it even if' she bid and that she couldn't have it. Plaintiff Ostapowicz was told it was foolish to try to qualify on a certain machine despite four years experience."

and that:

> "A foreman in the shipping department stated he would 'take every girl machine operator in the shipping department off and replace them with men' if a woman became a heavy packer."

After the plaintiff had made out a prima facie case, the burden of proof then shifted to the defendant. The company then argued that women lacked interest in becoming first class operators. The district judge rejected this testimony, and wrote: "The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate." After summarizing the evidence, he concluded, "This court has no hesitation in finding that there has been intentional discrimination at defendant's plant."

The findings of fact which support these conclusions must be shown to be clearly erroneous in order to be overturned. Fed. R. Civ. P. 52(a). As we stated in *Krasnov v. Dinan,* 465 F.2d 1298, 1302 (3d Cir. 1972):

> " 'In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are "left with a definite and firm conviction that a mistake has been committed." ' "



*See also Government of Virgin Islands v. Gereau,* 523 F.2d 140 (3d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3472 (U.S. Feb. 23, 1976). Defendant has not met this burden and the imposition of liability will be affirmed.

III.

As part of the relief which he felt to be necessary, the district judge awarded back pay and referred that phase to a United States Magistrate who held several hearings. This part of the case proved to be complicated for two reasons: the claims were based upon deprivations of opportunities to acquire skills on diverse jobs and thus secure promotions to better paying positions; and, during the years in question, there had been numerous strikes and layoffs because of economic conditions.

Absolute precision in ascertaining plaintiffs' loss under such circumstances cannot be expected: the court must make reasonable awards based on the available data. *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974). Here, the district judge determined that the period for computing the back pay award would begin two years before the date on which the first charge was filed,[8] making the starting date April 18, 1966. The award was composed of three elements: (1) the wage differential between first and second class operators for the periods during which plaintiffs work-

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8. Because we have previously determined that the charge filed in 1968 encompassed all phases of discrimination, even those revealed by later charges, we agree that the 1966 date was correct. Although the amendments to the Act passed in 1972, of course, were not in effect at the time the discrimination occurred, we believe the court's utilization of that period was proper under the circumstances.

ed; (2) wages lost through discriminatory layoffs; and (3) an amount representing lost fringe benefits.

The court determined that, based on seniority, the women who had worked as machine operators would all have been promoted to first class status by April 18, 1966, had discrimination not occurred.[9] The first portion of the award was measured by the difference between the average weekly wage for first class operators and that actually received by the individual plaintiffs. However, the amount attributable to discriminatory layoffs was not as easy to compute.

The company's business declined during the years in question and many employees were laid off for nondiscriminatory reasons. The magistrate had to determine which of the individual layoffs were due to discrimination and which were due to purely economic forces. It was extremely unlikely that anyone could ever qualify as a first class operator on each of the 200 different machines, but some of them were so similar in operation that experience on one would allow easy transition to another. For example, the operation of a small drilling machine might be quite similar to another larger drill, but both would be quite dissimilar to a chamfer machine. To make appropriate adjustments, the magistrate determined that the company's machines could be grouped into ten classifications. Utilizing these categories, she considered a woman discriminatorily laid off during the time a male with less seniority was working as a first class operator and a plaintiff had experience on his or a related machine. Further a plaintiff was discriminatorily

9. *See Gamble v. Birmingham Southern R.R. Co.*, 514 F.2d 678, 686 (5th Cir. 1975); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 453 (5th Cir. 1973).



laid off if a male with less seniority was working on a replaceable job or as a mail clerk or chauffeur, unless the plaintiff had been offered that position. On the assumption that no employment was available at a time when a male junior to a woman was not working as a first class operator, allowances were thus made for the numerous nondiscriminatory layoffs which occurred. The award included interest at the rate of 6%.

From the above sums were deducted: (1) amounts which a plaintiff could have reasonably earned during layoff periods or which were actually earned or received from unemployment compensation and (2) allowances for periods when a plaintiff was unemployable because of illness.

We do not find the composition of the formula or its application to be erroneous. It represents a conscientious effort to calculate reasonable and equitable awards under conditions which do not allow for absolute precision.

Among the remedies the court ordered was a provision that the company institute a training program administered by an outside firm to assist women in becoming first class machine operators, machine setters (the next higher category of skilled labor), and foremen. In addition, the defendant was required to submit periodic reports on affirmative action to plaintiffs' counsel and to establish a three member board as assurance against discrimination in future operations. The court also ordered "that any hiring in the future shall be in equal numbers of males and females."

Defendant strongly objects to the imposition of this open-ended hiring quota. We need not consider at length

the troublesome question of reverse discrimination, *DeFunis v. Odegaard,* 416 U.S. 312 (1974), and the language of Title VII, §§ 703-706, *see Franks v. Bowman Transportation Co.,* ..... U.S. ....., 44 U.S.L.W. 4356 (U.S. March 24, 1976); *United States v. International Union of Elevator Constructors, supra,*[10] because the record contains no support for this sweeping order.

A district court is granted wide discretion in formulating corrective measures for discriminatory conduct. *Franks v. Bowman Transportation Co., supra,* but the basis for its actions must be expressed to allow effective review. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). The order for a hiring quota does not pass muster because the court did not articulate factual findings and its reasons for this action.

Quotas are an extreme form of relief and, while this court has declined to disapprove their use in narrow and carefully limited situations, *United States v. International Union of Elevator Constructors, supra; Erie Human Relations Commission v. Tullio,* 493 F.2d 371 (3d Cir. 1974), certainly that remedy has not been greeted with enthusiasm. *Pennsylvania v. O'Neill,* 473

10. *See also Equal Employment Opportunity Commission v. Local 638,* 532 F.2d 821 (2d Cir. 1976); *Rios v. Enterprise Assn. of Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974); *Morrow v. Crisler,* 491 F.2d 1053 (5th Cir.)., cert. denied, 419 U.S. 895 (1974); *cf. Patterson v. American Tobacco Co.,* 535 F.2d 257, 274 (4th Cir. 1976). DeFunis Symposium, 75 COLUM. L. REV. 483 (1975).



F.2d 1029 (3d Cir. 1973).[11] The order in this case is open-ended in that it specifies no expiration date and applies across-the-board to all employees and all departments of the defendant company.

While it may be presumed that approximately half the population in a given area is female, that does not justify the conclusion that the available work force presents a similar ratio. No evidence on this point was introduced in the district court. Moreover, the court made no findings of whether females were qualified in all departments of the defendant's plant nor did it state whether the quota applied to each department or the company as a whole. Factual findings of this nature are vital, for in some respects there are significant differences in cases involving racial, as contrasted with sexual, discrimination, *see* 42 U.S.C. § 2000e-2(e)(1); 29 C.F.R. § 1604.2 (bona fide occupational qualifications based on sex, but not race, are permissible), and precedents from one area may not be freely interchangeable with those of the other. *Cf. Vorchheimer v. School Dist. of Philadelphia,* 532 F.2d 880 (3d Cir. 1976). Since these crucial factors have not been established in the record, this portion of the district court's order must be vacated.

Moreover, the district court's creation of a supervisory committee to oversee compliance with nondiscriminatory practices appears to be an effective method

11. For a discussion of the philosophical and practical difficulties inherent in the use of quotas, *see* Blumrosen, Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 RUTGERS L. REV. 675 (1974). *See also,* Sape, The Use of Numerical Quotas to Achieve Integration in Employment, 16 WM. & MARY L. REV., 481 (1975); Note, Race Quotas, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

to prevent future discrimination while at the same time permitting employment to be based on ability and availability. Because of the absence of support in the record for the hiring quota, we will vacate that portion of the district court's order. In all other respects, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.



## APPENDIX B

### Order Amending Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 75-2435

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ANGELINE R. OSTAPOWICZ,
Plaintiff-Appellee

v.

JOHNSON BRONZE COMPANY,
Defendant-Appellant

---

Present: KALODNER, ADAMS AND WEIS, *Circuit Judges.*

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**Order Amending Opinion**

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It is ORDERED that the second paragraph on page 9 of the slip opinion filed August 27, 1976 in the above entitled case is amended to read as follows:

> "The court cited *McDonnell Douglas Corp. v. Green, supra,* and carefully followed its guidelines in ruling on burden of proof at various stages of the case. The *McDonnell* case holds that once a prima facie case of a Title VII violation has been established, the burden shifts to the defendant to articulate

legitimate nondiscriminatory reasons for the unequal treatment shown in the prima facie case. The defendant must prove its justification by a preponderance of the evidence. *Franks v. Bowman Transportation Co.*, ..... U.S. ....., 44 U.S.L.W. 4356 (U.S. March 24, 1976); *United States v. International Union of Elevator Constructors*, ..... F.2d ....., (No. 75-2134, 3d Cir. July 21, 1976). *See also Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 259 (3d Cir.), *cert denied*, 421 U.S. 1011 (1975)."

BY THE COURT,

JOSEPH F. WEIS, JR.
Circuit Judge

Dated: September 29, 1976

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**APPENDIX C**

**Order Denying Petition for Rehearing**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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**No. 75-2435**

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ANGELINE R. OSTAPOWICZ,
Plaintiff-Appellee

v.

JOHNSON BRONZE COMPANY,
Defendant-Appellant

---

SUR PETITION FOR REHEARING

---

Present: SEITZ, *Chief Judge*, KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS AND GARTH, *Circuit Judges*.

The petition for rehearing filed by Defendant-Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and

a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ JOSEPH F. WEIS, JR.
Judge

Dated: September 27, 1976

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**APPENDIX D**

**Opinion of the District Court**

ANGELINE OSTAPOWICZ

v.

JOHNSON BRONZE COMPANY

**Civ. A. No. 71-404.**

UNITED STATES DISTRICT COURT,
W. D. PENNSYLVANIA.

Dec. 28, 1973.

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ROBERT HACKETT,
Pittsburgh, Pa.,
for plaintiff.
JONATHAN L. ALDER,
Pittsburgh, Pa.,
for defendant.

**Opinion**

KNOX, *District Judge.*

This is a class action case brought on behalf of plaintiff and other members of a class alleging that sex discrimination exists in the plant of Johnson Bronze Company, defendant, at New Castle, Pennsylvania. It is another of the cases described by Judge Dumbauld of this court in Bradford v. Peoples Natural Gas Company (W.D.Pa.1973), 60 F.R.D. 432, as resulting from the efforts of the "suave and subtle Southerners in Congress who put sex into the Civil Rights Act of 1964" when a giant step was taken towards "women's lib". The Section of the Act with which we are concerned is Section 703(a)(1) which reads:

> "It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex* or national origin." (42 U.S.C.A. § 2000e-2(a)(1).

This action was brought on April 28, 1971, based upon a previous finding of reasonable cause entered July 10, 1970, by the Equal Employment Opportunities Commission (EEOC) YCL-079 in which a thirty-day letter authorizing suit was issued March 29, 1971, which suit was thereafter duly commenced within the thirty days on April 28, 1971. On May 14, 1971, the complaint was amended to include two other thirty-day letters dated May 11, 1971, Nos. TCL-10558 and TCL-10802, Exhibits B and C attached to the Amendment to the Complaint, respectively.

After two days of hearings, the court concluded not to issue a preliminary injunction which had been sought, because no irreparable harm had been shown, although the court did determine tentatively that a prima facie case of sex discrimination had been made out. The evidence taken on the preliminary injunction is before us now under Rule 65(a). Despite protests by the defendant, the case was permitted to proceed as a class action and notices were duly sent to members of the class, certain of whom decided to opt out. Despite further attacks by the defendant, the court refused to deny the case the right to proceed as a class action.

After four more days of hearings, the case is now before the court for decision on the merits with respect to the issue of liability only. The issue of damages was deferred. The complexity of the issues in this bitterly



fought litigation is shown by the fact that defendant's brief contains 99 pages plus appendices and the parties have together requested 226 findings of fact. Most of these are unnecessary, being directed at minutiae of details of evidence of individual witnesses. We proceed to make what the court regards as the essential findings as follows:

## FINDINGS OF FACT

### (A) Procedural and Jurisdictional

1. Defendant Johnson Bronze Company is a Pennsylvania business corporation with its principal offices and only production plant which it owns and operates in New Castle, Lawrence County, Pennsylvania.

2. The plaintiff and other members of the class are individuals and residents of the Western District of Pennsylvania.

3. A charge was filed with the EEOC by Local 69, United Automobile, Aerospace and Agricultural Implement Workers of America (the union) on April 18, 1968, at Case No. YCL9-079 (hereinafter "YCL charges"). The union represented approximately 750 of the defendant's production and maintenance employees. The charge alleged that the defendant was maintaining job classifications segregated on the basis of sex, which segregation resulted in unequal lay-off and recall rights by female employees within the *bargaining unit* (our emphasis). Specifically, the charges related to the jobs of heavy packer in the shipping department, division 4 of the defendant's New Castle plant. The EEOC investigated this charge, and issued a decision on July 10, 1970, finding probable cause to believe the charge (Plaintiff's Exhibits A, UU).

4. On March 29, 1971, the EEOC mailed to all members of the union interested in the charge, a letter stating that conciliation had failed at Case No. YCL9-079, and that all members of the class were entitled to sue in federal district court within 30 days of the receipt of the letter.

5. The plaintiff, Angeline Ostapowicz, on behalf of the class, instituted this suit on April 28, 1971, within the thirty days after receipt of the EEOC "right to sue" letter. The complaint as originally filed included as an exhibit to the complaint the "right to sue" letter, wherein Angeline R. Ostapowicz was named as a member of the class (Plaintiff's Exhibit UU).

6. The amended complaint in this action also alleges two further charges: TCL1-0558 and TCL1-0802 (Appendices 2 and 3). On May 10, 1971, the EEOC issued thirty-day "right to sue" letters on these two additional charges and on May 14, 1971, the plaintiff amended her complaint to include these additional charges referred to as the 1970 charges, filed October 16, and 27, respectively.

7. On March 10, 1972, the court determined that this action should proceed as a class action.

8. By order of March 10, 1972, the description of the class was revised to read as follows: "All past, present and future female employees of defendant Johnson Bronze Company at its New Castle, Pennsylvania, plant including all females who may in the past have sought and been denied employment because of sex discriminatory practices, with subclasses as follows: (a) all present female employees; (b) all past female employees; (c) all future female employees; (d) all females who have sought and been denied employment because of sex discriminatory practices."



(B) ON THE MERITS

9. The defendant's plant operates in divisions as follows: (See Stipulation of Facts attached as Appendix A to Pretrial Stipulation.)

(1) Machine Shop

(2) Strip Manufacturing Department

(3) Foundry, Cleaning Room and Core Room

(4) Packaging and Shipping

(5) Maintenance

(6) Tool Room

(7) Safety and Sanitation

(8) Inspection

(9) Timekeepers and Expediters

(10) Pattern Shop

10. Mrs. Angeline R. Ostapowicz was one of the class of complainants in EEOC Case No. YCL9-079, having received a "right to sue" letter as a member of the class from the EEOC dated March 29, 1971.

11. As determined by the McBee personnel cards (Stip. Ex. 56) supplied by the defendant and the seniority list from the years 1960 to 1972 (Stip. Ex. 57), there have never been any females employed in the following divisions: (1) Foundry Division; (2) Tool Room Division; (3) Division 2 or Plant 2; (4) Maintenance Division and (5) Pattern Shop Division.

12. No woman ever operated as a department trucker in Division 1.

13. Lawrence Chiarini, seniority date May 27, 1952, was made a mail clerk in 1970 when many women senior to him were laid off; no female was ever made a mail clerk after 1960.

14. Rose Fortuna, hired October 25, 1948, and seven other women senior to Lawrence Chiarini, would not have had their employment terminated in 1972 if they would have been called back as mail clerks (Pltf's Ex. AA, Stip. Ex. 57).

15. In the year 1965, the defendant hired thirteen men in Division 1 and no females.

16. In 1966, the defendant hired 52 men in Division 1 and one female.

17. The only female hired in 1966 in Division 1 was Rose Curry, who was a relative of the former chief electrician of the defendant, Alex Pazsint. During the years 1963-1966, William Wise, personnel manager of the defendant, could recall hiring only one woman (Rose Curry) in Division 1.

18. During the years 1966 to 1972, the total employment of the defendant varied from 1,100 employees to 604 employees. There were extensive decreases in the number of employees during these years as the result of decline in business.

19. Of the total work force of employees slightly less than 50% are employed in Division 1.

20. According to the EEO-1 Reports filed by the defendant in 1966, there were 147 female semi-skilled operatives (Pltf's Ex. WW); in 1967, there were 150 female semi-skilled operatives (Pltf's Ex. VV); in 1968, there were 119 female semi-skilled operatives (Pltf's



Ex. XX); in 1969, there were 51 female semi-skilled operatives (Pltf's Ex. YY); in 1970, there were 53 female semi-skilled operatives (Pltf's Ex. ZZ); in 1971, there were 46 female semi-skilled operatives (Pltf's Ex. AAA); in 1972, there were 73 female semi-skilled operatives (Pltf's Ex. BBB).

21. In Division 1, there are four departments: aluminum, strip bushing, thin wall bearing and brass shops and in the four departments in Division 1, there are 320 machine centers. (Stip. Facts #19)

22. In the machine operations of the defendant in Division 1, there are two separate classifications of machine operators: first class and second class. (Stip. Facts No. 21)

23. In the years from 1960 until the end of 1972, there have been only two female employees who have been made first class machine operators in Division 1 and on only two classifications of machines. They were Norma Ferrante and Theresa Trivilino.

24. A second class operator makes approximately ten cents per hour less than a first class operator under the wage scale.

25. Strength is not a determinative factor in becoming a first class operator and females are physically capable of making set-ups.

26. The manufacturing by the machines in Division 1 must meet precise specifications with very close tolerances.

27. The defendant's witness, William Wise, personnel manager, stated that to become first class, one

must learn by tear-downs, watching machine setters, asking questions and attempting to make set-ups.

28. It is not possible to qualify for first class without experience, and you get the ability to be first class on machines only where you were second class. If you know how to set-up one type of machine in one machine center, this does not mean that you know how to set-up another machine in another machine center.

29. An employee who bumps[1] another employee on a machine has to be able to operate the machine and qualify as a first class operator immediately upon making the bump.

30. The defendant has no formal training program to help second class operators in the first division become first class operators.

31. Male machine operators were promoted to first class with no training and much less experience than females. Women were sent to the restroom and hence could not watch setters setting up their machines. The foreman of the defendant did not allow women to wait and watch machine setters set up the machines. This prevented women from acquiring the necessary skills.

32. In an average month, there are approximately 1,600 set-ups made by first class operators and 1,450 made by machine setters.

33. First class operators spend about 1,900 hours on set-ups and the machine setters spend about 2,000 hours on set-ups.

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1. "Bump—to oust, usually by virtue of seniority right." Webster's Seventh New Collegiate Dictionary.



34. Machine setters, in fact, do make difficult set-ups for first class machine operators and set-ups on long runs.

35. The management of the defendant, which determines whether or not a woman is promoted to first class, is all made up of males; there are no women in the management.

36. As of May 25, 1971, there were 26 men junior to plaintiff Ostapowicz working while she was laid off. All 26 of the men were first class operators.

37. Many men who were junior to female employees were laid off after female employees had been laid off and were recalled while senior female employees were still in lay-off status (Pltf's Ex. L).

38. Some women who were second class and were going to be laid off in 1967 had the desire to become first class so that they would not be laid off. Other women indicated no desire for such advancement.

39. No women were ever promoted to machine setters, foremen or assistant foremen.

40. No females have ever been paid on a wage scale of over $2.32 per hour. (Pltf's Ex. M and P)

41. The highest male wage earner makes a base wage of $4.51, based upon the base wage rate of March 27, 1972. (Pltf's Ex. M and P).

42. A woman who desired to become first class was told by the personnel manager that she "couldn't get it even if" she bid and that she couldn't have it. Plaintiff Ostapowicz was told it was foolish to try to qualify on a certain machine despite four years experience.

43. No record was kept by defendant of applicants who were turned away, so that it cannot be determined how many were women.

44. A foreman in the shipping department stated he would "take every girl machine operator in the shipping department off and replace them with men" if a woman became a heavy packer.

45. Whether a person is promoted to a machine setter or an assistant foreman or foreman or to management is solely up to the discretion of management, as there are no contract provisions and no objective tests are given. The tests were all subjective.

46. Machine setters were taken exclusively from the ranks of the first class machine operators; *ipso facto*, if there are no first class machine operators that are women, there can be no machine setters that are women.

47. The application of the defendant company for employment contains a sex indication on it, indicating female or male sex (Pltf's Ex. I); and the sex indication of those employees hired before the Civil Rights Act of 1964 went into effect in July, 1965, has not been obliterated from their employment records, i.e., McBee personnel cards.

48. If female employees who were laid off had not previously bumped a certain job classification, they were automatically not recalled to that classification at any time in the future; therefore, this increased their lay-off time so that they were eventually terminated.

49. The court adopts and incorporates by reference the facts contained in paragraphs 5 through 38, both inclusive, of Pretrial Stipulation of Facts attached as Exhibit A to the Pretrial Stipulation.



## DISCUSSION

The discussion in this case falls naturally into two categories: (A) Procedural and Jurisdictional, and (B) The Merits of the Case.

### (A) Procedural and Jurisdictional Matters

#### (1) *Extent of Charges and Jurisdiction of the Court*

The defendant strenuously claims that the complaints of the plaintiff and the other members of the class are not properly before the court since charges were never properly filed before the Equal Employment Opportunities Commission, hereinafter referred to as EEOC. The facts are that on April 11, 1968, plaintiff's union, Local 69, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, as charging party filed a charge before the EEOC claiming violation of the law from December 1, 1967 "and continuing". This was assigned Case No. YCL9-079 by the Commission. The charge was served June 20, 1968.

The Commission handed down a decision on this dated August 6, 1970, in which it was determined that reasonable cause existed to believe the charges are true. In the decision, it is stated: "Charging party, hereinafter called the Union, alleges that respondent is engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 by maintaining job classifications segregated on the basis of sex which segregation results in unequal layoff and recall rights for female employees within the bargaining unit". The Commission further found: "The alleged violations are of a continuing nature, and therefore the filing was within the jurisdictional time limits of Title VII."

The time limits referred to are those contained in 42 U.S.C.A. § 2000e-5(d) as contained in the original Act of July 7, 1964.[2] This time was extended to 180 days by the 1972 amendments.

On March 29, 1971, conciliation efforts having failed, the EEOC sent to plaintiff Angeline Ostapowicz a so-called thirty-day letter which is found as plaintiff's Exhibit UU and is also attached to the complaint in this case as Exhibit A. This letter in the heading refers to "Case No. YCL9-079 (member of class)". It advised that conciliation efforts having failed, she had the privilege within thirty days of receipt of the letter to institute a civil action in the appropriate federal district court. This action was instituted April 27, 1971, and hence was in time.

It is true that the bulk of the decision of the EEOC is concerned with exclusion of females from heavy packing positions in the shipping department because of sex, but it is also true that the charge as filed was a general charge of sex discrimination.

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2. *"Time for filing charges after occurrence of unlawful practices or termination of State or local enforcement proceedings; filing of charges by Commission with State or local agency.*

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."



We are cautioned by the United States Supreme Court in Love v. Pullman Co., 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) that in cases of this type we should not require "the creation of an additional procedural technicality.

"Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." It has been further held that the fact that all acts complained of did not occur within ninety days prior to the filing of the charge does not prevent consideration of the charge if a pattern of discrimination is shown and it is alleged that these are continuing practices of discrimination. See Fekete v. United States Steel, 353 F.Supp. 1177 (W.D.Pa.1973-Judge Scalera); Hecht v. Co-Operative for American Relief, 351 F.Supp. 305 (S.D.N.Y. 1972); Bartness v. Drewrys, 444 F.2d 1186 (7th Cir. 1971). In such case any member of the class may bring the action. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). We therefore hold that the charges as contained in YCL9-079 and in the complaint and covered by the evidence in this case are properly before this court. See also Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

(2) *Effectiveness of Charges TCL1-0558 and 1-0802 included in the Amendment.*

Defendant vigorously contends that the additional charges of discrimination contained in the above case before the EEOC are not properly before the court because the thirty-day letter giving right to sue was issued by the Commission in each case on May 11, 1971, and it is claimed that the charges were not filed in court until August 12, 1971, when they should have

been brought within thirty days under 42 U.S.C.A. § 2000e-5(e).

It is true that the Commission issued its thirty-day letters on these additional charges on May 11, 1971. The record in the case, however, shows that an amendment to the complaint containing the additional thirty-day letters at the above numbers was filed May 14, 1971, well within the thirty-day period. It is true that on August 12, 1971, at the time of the second hearing on preliminary injunction, the court entered an order allowing the amendment to be filed. But this order appears to have been surplusage. The original complaint was filed April 28, 1971, and the Answer was not filed until May 28, 1971, and therefore plaintiff had a right to amend her complaint without leave of court under Rule 15(a) of the Federal Rules of Civil Procedure and include the additional charges on May 14, 1971. In view of the fact that the additional charges covered by the two additional thirty-day letters pertain to sex discrimination at this very plant, there appears to be no good reason to the court why such amendments should not be allowed rather than forcing plaintiff to file a separate action based thereon which would probably have been consolidated with this case. The plaintiff, Angeline Ostapowicz, had to file her complaint in court within thirty days of the first thirty-day letter issued March 29, 1971, which she did, filing a complaint in this court on April 28, 1971. At that time, she had no thirty-day letter covering TCL1-0558 and 0802. If she attempted to include these charges at that time, she would have obviously been met with a motion to strike by the defendant. She filed them promptly on May 14, 1971. Under McDonnell-



Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (May 14, 1973) it has been determined that the only two requisites to court action are: (1) timely filing of charges and (2) receiving and acting upon the statutory notice of the right to sue. Defendant's complaints of the failure of the EEOC to attempt to conciliate are therefore without merit.

The original complaints filed with the Commission at cases 0558 and 0802 are in evidence in this case, Stipulation Exhibits 13 and 14, and are clearly broad enough to cover all matters covering sex discrimination which have been brought to this court's attention during the hearings in the suit. We therefore hold these matters are all properly before the court.

(3) *Failure to File Charges With the Pennsylvania Human Relations Commission.*

Early in the course of this litigation, defendant claimed that the court was without jurisdiction in the matter because the case had not first been taken to the Pennsylvania Human Relations Commission, which is charged with jurisdiction over sexual discrimination under 43 Purdon's Pa. Stats. § 955, Act July 9, 1969, P.L. 133. The facts concerning this are set forth in the Court's memorandum order of September 22, 1971. It appears that the charges here involved were first filed with the EEOC, which referred this charge to the Pennsylvania Commission on September 29, 1970, and plaintiff wrote the Pennsylvania Commission on October 6, 1970, offering to make any further information available to it. However, on October 15, 1970, the Pennsylvania Commission waived jurisdiction over the case, as they were doing with all cases at that time, and referred the matter back to the EEOC. We held that

this was substantial compliance with the requirements of the Act, 42 U.S.C. § 2000e-5(b).

This holding of the court is in accord with the later decision of the United States Supreme Court in Love v. Pullman Company, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) holding that such procedure was sufficient compliance with the federal Act.

(4) *Failure to Join the Union as an Indispensable Party.*

Plaintiff in her 1970 complaints 0558 and 0802, did claim that the union contract operated to discriminate against women. Particular complaints are made with reference to Article XXI as to bumping rights (Stip. Ex 35, being the agreement between the defendant and Local Union No. 69, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America of which plaintiff was a member). Local Union 69 was not named as a respondent in the proceedings before the EEOC and is not named as a defendant in this case. On the other hand, the defendant has made no motion at any time during the course of this litigation to require plaintiff to join the union as a party. Most of the cases upon which the defendant relies are cases revolving around the motion to require the union to be joined. In the present posture of the case, without a motion to require joinder of the union, we have a question as to whether the union is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

We agree with the decision of Judge Weiss, now Circuit Judge, of this court in Torockio v. Chamberlain Manufacturing Company, 51 F.R.D. 517 (W.D.Pa. 1970), that the fact that the union was not joined in the



proceedings before the EEOC does not prevent joinder under Rule 19. It is noted, however, that in Torockio, the court did not rule on the question as to whether the union should be joined as a necessary party but merely indicated that joinder might be desirable.

Considerable reliance is placed by the defendants also upon Window Glass Cutters League v. American St. Gobain Corp., 47 F.R.D. 255 (W.D.Pa.1969), aff'd 428 F.2d 353 (3d Cir. 1970). That case, however, involved claims of rival unions where a decree enforcing the alleged rights of one union would necessarily effect the rights of others. Defendant also relies upon Hodgson v. New Kensington School Board in this court, Civil Action No. 71-1199 (unreported), wherein Judge Teitelbaum held that in an action under the Equal Pay Act, 29 U.S.C. § 201, by certain employees, the union should be joined. Again, what was before the court was a motion to compel joinder, and the employees by enforcing their alleged rights to equal pay were bound to cause the restructuring of the contract between the union and the school district.

In the reverse situation, in United States v. Sheet Metal Workers International Association, 416 F.2d 123 at 132 (8th Cir. 1969), in a suit against the union, the court recognized that the employers with whom the locals had collective bargaining agreements were not parties to the suit but held that they assumed that an agreement would be made to comply with the court's decree; if not, a decree against the union would be sufficient, or a question of joinder of the employers could be left for a later time.

In the instant case, it is true that plaintiff claimed there was discrimination as the result of the provisions

of the collective bargaining agreement. In examining these provisions in detail, however, it does appear to the court that the complaint is not so much over the language in the agreement as over the fact that, given the setting of sex discrimination in this plant, the provisions of the contract then operate to the disadvantage of women. If the sex discrimination is eliminated as the result of orders of this court, then it would appear that the provisions as to bumping rights and so forth will work themselves out without any revision of the contract necessarily being involved. See also United States v. Bethlehem Steel Corporation, 312 F.Supp. 977 (W.D. N.Y. 1970), aff'd as modified 446 F.2d 652 (2d Cir. 1971).

We adopt plaintiff's argument as set forth in page ten of her reply brief where she says:

> "Factually, the plaintiffs are unable to determine if the contract itself is discriminatory, or if it is the defendant's policy of not promoting the second class operators to first class operators which has caused the problem. It would seem that the provision in the contract perpetuates past discrimination, but if the females are made first class operators, the whole question of the contract is moot."

We also note that Article 7 of the contract[3] gives the company broad management powers which would

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3. "The right to hire; promote; discharge or discipline for cause; and to maintain discipline and efficiency of employees, is the sole responsibility of the Company except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the direction of personnel, the methods, processes and means of manufacturing and the decision on matters affecting the conduct of the business of the Company, are solely and exclusively the responsibility of the Company, provided the above does not conflict with any other Articles in this Contract."



be sufficient to eliminate discrimination in the opinion of the court.

In summary, the court at this time is unable to see how the union would be affected by a decree requiring the employer to end sex discrimination, and therefore we hold that the union is not an indispensable party under Rule 19.

(5) *Election of Remedies as a Result of Arbitration Award.*

It is noted that the right to sue letters name the plaintiff Ostapowicz as a member of the class and give her the right to sue. Defendant claims that she cannot bring this suit in court because at various times in the past she had submitted grievances growing out of her alleged discriminatory treatment to arbitration. The court finds that there is no merit in this contention and agrees with what was said about this in Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970), at page 313:

> "But the arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights."

The court holds that the ultimate determination of Title VII rights is a matter for the court.

In Hackett v. McGuire Brothers, Inc., 445 F.2d 442 (3d Cir. 1971), the court held that election of remedies did not apply to Title VII discrimination proceedings and said:

> "The national public policy reflected both in Title VII of the Civil Rights Act of 1964 and in

> Section 1981 may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative."

See also Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

Having now discussed the procedural and jurisdictional arguments raised by the defendant, we will turn to the merits of the case.

(B) MERITS.

(1) *General Considerations.*

The trail which the court must follow through the labyrinth of facts presented in this case has recently been plainly marked by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The court there said:

> "The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. The Commission itself does not consider the absence of a 'reasonable cause' determination as providing employer immunity from similar charges in a federal court, 29 CFR § 1601.30, and the courts of appeal have



> held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings, 'court actions under Title VII are de novo proceedings and . . . a Commission's 'no reasonable cause' finding does not bar a lawsuit in the case.' "

The court further quoted from Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), as follows:

> "Congress did not intend Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

The court further held that the complainant in a case such as this must carry the initial burden of establishing a prima facie case of discrimination[4] which may be done by showing: (1) that she belongs to the protected group, (2) that she applied for and was qualified for a job for which the employer was seeking applicants, (3) that despite her qualifications

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4. McDonnell-Douglas Corp. involved racial discrimination, but the same rules would apply to sex discrimination.

she was rejected and (4) that the employer sought applications of other persons of equal qualifications.

The court then held that the burden thereupon shifts to the employer to articulate some legitimate non-discriminatory reason for respondent's rejection. The court went on further to hold that even if the employer articulates a facially ligitimate non-discriminatory reason for rejection of the employee or proposed employee, it must further appear that the rejection was bona fide and that the conduct of the employee was not used as a pretext for discrimination. It appears that the burden of showing pretextual rejection is upon the employee once a legitimate reason has been articulated. With respect to statistics, the court went on to say:

> "Other evidence that may be relevant to any showing of pretextuality includes facts as to the petitioner's treatment of respondent during his prior term of employment, petitioner's reaction, if any, to respondent's legitimate civil rights activities, and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks."

The court further commented with respect to Griggs, supra, that:

> "It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."



The latter quotation is particularly apt with respect to the claim of the plaintiff that the so-called tests for advancing women to machine operator first class were a sham in view of the fact that no training program was provided to train women for such advancement and that women were not allowed to look on and observe while complicated setups were being made but instead were told to go to the ladies' room, whereas men were allowed to stand around and observe by observation.

We have the further principle involved with respect to sex discrimination under Title VII that "equality of footing is established only if employees otherwise entitled to the position whether male or female are excluded only upon a showing of individual incapacity . . . . This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work." Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

Our Third Circuit has likewise recognized that statistics may give rise to an inference or prima facie case of discrimination. See Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973). In that case, the court pointed out that the company had operated under an assumption that women were physically unable

to perform each and every production job.[5] In the present case, the court asked the personnel director whether it was the company's position that women were physically unable to perform the tasks of setting up these machines when it appeared that the amount of weight to be lifted was minimal. It was apparent this was not the explanation for having scarcely any women as first class machine operators in division one. The court then asked if it was the company's position that women, while physically capable of performing these operations, were nevertheless intellectually inferior and unable to master these operations, which would be a serious charge against approximately one-half the human race. The only explanation offered as to the substantial lack of women in these jobs was that women didn't want them which, of course, is disproved by the fact that this suit is brought.

(2) *Weight to be Given EEOC Findings.*

The parties have spent considerable time arguing about the effect of the EEOC findings.

It seems that the trial in the district court is de novo, McDonnell-Douglas Corp., supra; Cox v. Babcock & Wilcox Co., 451 F.2d 13 (4th Cir. 1972). It has been held that the EEOC findings may be admitted into evidence in the trial in the district court, although the report is in no sense binding, and it has been said

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5. The order in Jurinko, was vacated, 414 U.S. 970, 94 S.Ct. 293, 38 L.Ed.2d 214, on October 23, 1973, and remanded "for further consideration in the light of McDonnell-Douglas Corp. v. Green," supra. With respect to the making out of a prima facie case, however, Jurinko appears to be in harmony with McDonnell-Douglas.



that they should be given no more weight than any other testimony at trial. We agree with the reasoning of the Fifth Circuit in Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972), wherein it was said:

> "Certainly, these are determinations that are to be made by the district court in a de novo proceeding. We think, however, that to ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary."

It has been further held that the admission of the EEOC findings is a matter of discretion for the court. Heard v. Mueller Company, 464 F.2d 190 (6th Cir. 1972). It is also true that in Griggs v. Duke Power Co., supra, the United States Supreme Court indicated that administrative interpretation of the Act by the Commission is entitled to great deference. This, however, appeared to apply to the guidelines interpreting the Act (referred to hereafter) and not necessarily to the findings of fact in a specific case.

In the instant case, it makes very little difference. We only have distinct findings and conclusions with reference to the heavy packers in the shipping department, Division No. 4, and while we have pointed out there were general charges made before the Commission at that time, the discussion is entirely devoted to the heavy packing question.

The defendant claims that discrimination in the shipping department has ceased since 1968, and therefore these findings should not be considered, since it is claimed that all discrimination has ended. We hold that

the evidence does sustain that at various times there has been discrimination in the shipping, this evidence being entirely aside from the findings of the EEOC; and the fact it may have ceased does not militate against the court issuing injunctive relief as to the future because this is all one plant and there is no safeguard against such discrimination being renewed.

With respect to the other charges made in TCL1-0558 and 0802, the Commission made no specific findings with respect to discrimination charged in those complaints but instead merely issued thirty-day letters. We therefore have no findings by the Commission which are in evidence in this case.

In other words, we consider this a matter of little or no importance. We have admitted the findings by the EEOC into evidence in this case along with all the other evidence but are giving these findings very little if any weight in our ultimate determination.

(3) *Prima Facie Case of Discrimination.*

After the hearing on the application for preliminary injunction, the court made a tentative finding of sex discrimination, although the preliminary injunction was refused for lack of showing of irreparable harm.

Now that the testimony has been completed, it appears under the rules in McDonnell-Douglas, there has been a definite prima facie showing of discrimination. A reference to the findings of fact makes this amply clear. They show that there was discrimination in advancement of women from second class machine operator to first class machine operator in Division 1; there has been discrimination with respect to females becoming heavy packers, certain divisions have no female



employees, the hiring in certain divisions has been heavily loaded in favor of males, women with seniority have been terminated while males with junior rating were kept on, and no females have ever been promoted to management positions.

Defendant apparently claims that the decrease in number of females has been due to attrition as the result of decrease in employment at the plant, but despite the attrition, the fact that females have been discharged at a greater rate would indicate sex discrimination in the discharges. While defendant claims that the discrimination which previously existed in the shipping department was ended in 1968, the record indicates that it was still existing in 1970. There has been no proof that the job of heavy packer must be filled by males by reason of bona fide job qualifications or business necessity as a result of a requirement to do heavy work. We have testimony to the contrary from Donna Sieminowski, who said (Tr-287): "In your estimation, will you say that it is very clear that females could always have done the heavy packer's jobs in the shipping department? Answer: I believe they could have without intimidation."

The evidence further shows that no females have ever been employed in the foundry division, toolroom division, Division No. 2—(strip department), the maintenance division, nor has any female ever been employed as a department trucker in division 1, nor as a mail clerk since 1960. The evidence further shows that in division 1, in various years, a large number of men were hired and either none or one female. The one female hired in 1966 appears to have been a relative of a former chief electrician. The personnel manager indicated that in the years 1963-1966, he could recall hiring only one

woman in this division. There are women working in division 1. There are on the average of fifty females employed therein, but only one woman was permitted to qualify as a first class operator. The first class positions were those where it was necessary for a woman to qualify to set up a machine, either immediately in case of a bump or within five days in case of bidding on an opening. The only inference to be derived from the fact that only one woman ever was accepted as a first class machine operator is that it is a result of sex discrimination.

It is true that it appears that there were tests given, and a foreman giving a test testified that the women could not qualify, but these were all subjective tests, no objective tests were ever given. The record further shows that no training program was ever provided so they could qualify. As a matter of fact, training appears to have been given by observation only and yet, when machines were being set up, women were told to go to the ladies' restroom instead of being permitted to stand and observe the setups.

The court is very conscious that a company should not be mandated to employ unqualified people on machines and that it is not the purpose of the Act to force employment where there is a bona fide disqualification. See 42 U.S.C. § 2000e-5(g).

The evidence, however, showed that there was no particular amount of strength required in setting up the machines since the articles that had to be lifted weighed from one to twelve ounces and there is further testimony about actual hostility against women being expressed by the personnel director of the defendant's plant.



As further evidence of the fact that women were unnecessarily disqualified as first class machine operators is the fact that first class machine operators the men, did not always set up their own machines. As a matter of fact, approximately half of the setups, i.e., putting the machine in position to do the next job, were performed by machine setters instead of by the machine operator himself.

With respect to the layoffs as the result of decrease in the defendant's business, it appears there was further discrimination in that the women who were second class machine operators, but senior to first class machine operators, were laid off before the first class operators and if a woman had once turned down a chance to bump for a certain job, she would not be re-called if laid off because she had turned down this bump.

As previously pointed out, it further appears that no women were ever promoted to machine setters, foremen, or assistant foremen, and all the people in management who made the decisions were male.

Keeping minority members in menial jobs has been held to establish a violation of Title VII of the Civil Rights Act of 1964. Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970). Again, in Rowe v. General Motors Corporation, 457 F.2d 348 (5th Cir. 1972), the court said:

> "All we do today is recognize the promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foremen are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that

matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action."

Classifying women into a separate division so as to establish separate seniority rights has been held a violation of the Act. Glus v. G. C. Murphy Company, 329 F.Supp., 563 (W.D.Pa. 1971).

It is also claimed that the defendant has carried through on its personnel records notations of the sex of the individuals, thus enabling them to determine whether a person was male or female for the purpose of bumping, promotions, and so forth. Such listing has been held improper. Pittsburgh Press Company v. Pittsburgh Commission of Human Relations, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973).

It is true that the defendant is not necessarily responsible for actions of all its employees in expressing or actively carrying out feelings of hostility towards women, but the defendant is responsible for acts of supervisory personnel. Fekete v. United States Steel Corporation, supra.

(4) *Rebuttal of Prima Facie Case.*

Following the course marked for us by McDonnell-Douglas Corporation, supra, having determined that the statistics and other evidence in this case show a prima facie case of sex discrimination, the burden then shifts to the employer "to articulate some legitimate non-discriminatory reason for respondent's rejection". While defendant has produced a large amount of testimony indicating that certain women were happy in the plant



and thought there was no discrimination and while various officials disclaimed any intention of sex discrimination, nevertheless, we weigh this evidence in the light of the principle that actions speak more loudly than words. The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate.

The defendant has attempted to justify its actions upon the grounds that there was a bona fide occupational qualification, that whatever discrimination appeared was a matter of business necessity, and further that females did not want these jobs and did not want to be advanced, for example, to machine operator first class.

It is true that certain females testified they did not want the responsibility which went with the job of machine operator first class even though this meant more money, and the same, of course, might be true of many men. In the view of the court, however, this appears to be a type of warrantless assumption based on generalizations or stereotyped characterizations of the sexes, illustrations of which are given in the guidelines adopted by the EEOC. See 29 CFR 751, part 1604.2.[6]

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6. "The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions the comparative employment characteristics of women in general. For example, the assumption that the turn-over rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that

As a matter of fact, this characterization sounds like labels: "Men's Jobs" and "Women's Jobs", which have been held improper. See Pittsburgh Press Company, supra. It is the opinion of the court that to justify failure to advance women because they did not want to be advanced is a type of stereotyped characterization which will not stand. The regulations specifically provide that "individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group".

As previously pointed out, however, a generalization such as this, that women do not want advancement, simply will not stand in the face of the numbers of women who did not opt out in this suit.[7] According to the Clerk of Court's records, six females in subclass A did not opt out, and in subclass B, nineteen did not opt out. This certainly indicates that the members of the class who are still involved in this suit at least have interest in being advanced and that the facile excuse that women were not interested in advancement simply will not stand against the facts.

As to the defense of bona fide occupational qualification, this is of no moment in this case since it has been

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women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

7. By order dated March 10, 1973, four subclasses were described: Subclass A—present female employees; Subclass B—past female employees; Subclass C—future female employees; and Subclass D—females who have been denied employment because of discriminatory practices.



conceded that the matter of weight lifting among machine operators is of no importance, since the weights to be lifted are minimal. Insofar as this may have been a factor in past discrimination among the heavy packers, the defendant appears to have conceded that women are able to perform these tasks because the defendant now claims that any discrimination in the shipping department has been ended. Certainly, there is no particular bona fide occupational qualification with respect to advancement of women to foremen, assistant foremen or machine setters.

As to business necessity, it would appear that defendant is attempting to argue that it is bound by the terms of its agreement with the union with respect to seniority, and therefore, it cannot give effect to the anti-sex discrimination regulations. This to the court appears no defense at all. It has been held that defenses based upon seniority systems set up with the union, which are sexually discriminatory, are no defense. See Glus v. G. C. Murphy Company, 329 F.Supp. 563 (W.D. Pa. 1971).

In United States v. Bethlehem Steel Corporation, 446 F.2d 652 (2d Cir. 1971), the court has this to say at page 662:

> "We accept that definition, but in the context of this case the 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. Clearly such a result is not correct under Title VII. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir.

1970). Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. Local 189, United Papermakers v. United States, supra, 416 F.2d 980, at 989. If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

It appears that the business necessity doctrine means that there must be an overriding legitimate business purpose making the practice necessary to the safe and efficient operation of the business. United States v. Chesapeake and Ohio Railway Company, 471 F.2d 582 (4th Cir. 1972). Under the guidelines, further illustrations are given of a bona fide occupational qualification, such as a need to have an actor or an actress in a certain role in the theatre. This is certainly not the type of position. There may also be extreme cases where a history of rapes during the night hours in dangerous locations indicate that females should not be exposed to these hazards, but nothing like that has been shown in this case.

We should further point out that it may be that defendant's expressed hostility to females attempting to qualify as first class machine operators and the results of subjective tests given by foremen to females who attempted to qualify would naturally have a chilling and discouraging effect upon female applicants, who would naturally conclude that it was no use and would only get them into more trouble with management than the difference in pay would be worth. See for example,



Lea v. Cone Mills Corporation, 301 F.Supp. 97, aff'd 438 F.2d 86 (4th Cir. 1971).

It is true that we should not attempt to put unqualified women on the job. We are not informed as to the details of the test given all workers, however, the record shows that numerous men qualified as machine workers first class, whereas only one woman was so qualified over a period of years. The court, of course, cannot go into the plant and administer these tests, and it may be that this will be a difficult matter to supervise. Regardless of the specific nature of these tests and the specific results as to attempts by individual applicants to qualify, it appears to the court that the results of sex discrimination which seem to permeate this organization are operating in this area, and the court will have to do the best it can to frame remedies to insure that future qualifications tests are objective and not based upon subjective matters coupled with sex hostility.

(5) *Intentional Discriminaton.*

Under the provisions of 42 U.S.C.A. § 2000e-5(g), the court must find that the respondent "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or order other affirmative action or reinstatement or hiring with or without back pay.

The court has no hesitation in finding that there has been intentional discrimination at defendant's plant. Entirely aside from the expressions of management indicating hostility to female employees, we have the general rule as laid down in Local 189, United Paper-

makers v. United States, 416 F.2d 980 (5th Cir. 1969), that the word "intentional" in this Act means that the defendant intended to do what it did, not that there was necessarily a deliberate and intentional violation of the law. This reasoning has been followed by the Court of Appeals for this Circuit in Kober v. Westinghouse Electric Corporation, 480 F.2d 240 (3d Cir. 1973) affirming the decision of Judge Weber of this court in 325 F.Supp. 467 (W.D.Pa.1971). The Court of Appeals said: "intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Section 706(g)."

(6) *Relief to be Granted.*

There still remains to be determined by the court what, if any, relief should be granted in a situation of this kind. At the present time, we have heard only the testimony with respect to liability, and the question of back pay and other relief has been left for subsequent determination by the court. The court is given broad powers under Section 706(g) (42 U.S.C.A. § 2000e-5(g)) quoted. In view of the findings of intentional discrimination, the remedies available are (1) injunction, (2) ordering affirmative action, (3) awards of back pay. It would appear that any affirmative action taken should at a minimum include a training program whereby women can secure adequate training to pass the tests for advancement, and steps must be taken to assure that these tests are objective tests and not subjective tests depending upon the whim and will of individual foremen and other supervisors. It may be that the question of back pay should be referred to a magistrate for hearing



and recommendation. We will, therefore, assign the case for further argument with respect to the question of relief to be granted. See supplemental Pretrial Order dated October 24, 1972, postponing consideration of damages and so forth until after determination of liability.

## CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter of this action under the provisions of the Civil Rights Act of 1964 as amended, Title VII, Section 706 (42 U.S.C.A. § 2000e-5).

2. This action has been properly brought by the plaintiff as a class action on behalf of the classes and subclasses described in this court's order of March 10, 1972.

3. The defendant is an employer within the meaning of Section 701 of said Act (42 U.S.C.A. § 2000e) and plaintiff is an employee of defendant.

4. Defendant has engaged in unlawful employment practices in violation of Section 703(a) of said Act (42 U.S.C.A. § 2000e-2(a) in discriminating against plaintiff and other members of the class because of sex.

5. This proceeding is properly before this court under Section 706 of said Act (42 U.S.C.A. § 2000e-5).

6. The defendant has intentionally engaged in and is intentionally engaging in the unlawful employment practices described in paragraph 4 of these conclusions of law.

7. The prima facie case of sex discrimination shown by plaintiff's evidence has not been rebutted by defendant's evidence.

8. Plaintiff is not barred from seeking relief in this proceeding by any grievance procedures, arbitration proceedings or complaints to the National Labor Relations Board.

9. The unlawful employment practices in which defendant has engaged have permeated the entire work force of defendant's plant.

10. Under the circumstances of this case, Local Union No. 69, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, the Collective Bargaining Agent at defendant's plant, is not an indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

11. A decree should be entered in favor of the plaintiff and against the defendant for the causes of action declared upon in the complaint.

12. The question of appropriate relief to be granted in this case whether injunction, affirmative action, costs, fees and/or awards of back pay shall be determined after further hearing and argument which is hereby fixed for Thursday, January 10, 1974, at 3:30 p. m.

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## APPENDIX E

Section 706(f)(1), Title VII of the Civil Rights Act of 1964, as amended, 42 § 2000e-5(f)(1):

> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case

involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

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## APPENDIX F

Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (1970) [since *replaced by* Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973)]:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

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IN THE

# Supreme Court of the United States

**October Term, 1976**

**No. 76-622**

JOHNSON BRONZE COMPANY,
*Petitioner,*

v.

ANGELINE R. OSTAPOWICZ,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATUTE.



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### I.
### Opinions Below

The opinion of the court of appeals is reported at 541 F.2d 394 (3rd Cir. 1976). The opinion of the district court is reported at 369 F. Supp. 522 (W.D. Pa. 1973).

### II.
### Jurisdiction

The jurisdictional prerequisites are adequately set forth in Petitioner Johnson Bronze Company's (hereinafter "Johnson") Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter the "Petition").

## III.

### Statute Involved

The statute involved is set forth in Appendix E and F of the Petition.

## IV.

### Questions Presented

A. HAVE THE JURISDICTIONAL PREREQUISITES TO A TITLE VII ACTION SET FORTH IN McDONNELL DOUGLAS CORP. V. GREEN BEEN SATISFIED WHERE: (1) IN 1968 A UNION, ON BEHALF OF "THE FEMALE EMPLOYEES" FILED A TIMELY EEOC CHARGE ALLEGING A GENERAL PATTERN OF LAYING OFF FEMALES IN VIOLATION OF SENIORITY RIGHTS; (2) THE EEOC IN AUGUST, 1970 FOUND "REASONABLE CAUSE" AFTER INVESTIGATING THE SHIPPING DEPARTMENT OF THE EMPLOYER; (3) A FEMALE UNION EMPLOYEE WHO WORKED IN THE SHIPPING DEPARTMENT AND ANOTHER DEPARTMENT OF EMPLOYER FILED ADDITIONAL CHARGES ALLEGING VIOLATION OF SENIORITY RIGHTS IN THE FALL OF 1970; (4) THE EMPLOYEE RECEIVED A RIGHT TO SUE LETTER UNDER THE 1968 CHARGE AND FILED A TIMELY FEDERAL ACTION APRIL 27, 1971; (5) ON MAY 10, 1971 THE EMPLOYEE RECEIVED RIGHT TO SUE LETTERS ON THE 1970 CHARGES AND (6) WITHIN 30 DAYS AMENDED HER COMPLAINT TO INCLUDE THE RIGHT TO SUE LETTERS?



B. WHERE AN EMPLOYEE CLASS OF FEMALES HAS ESTABLISHED A *PRIMA FACIE* CASE OF SEX DISCRIMINATION IN A TITLE VII ACTION, DOES THIS COURT'S LANGUAGE IN McDONNELL DOUGLAS CORP. V. GREEN, TO WIT: "the burden then must shift to the employer to articulate some legitimate nondiscriminatory reason . . ." MEAN THAT AN EMPLOYER NEED ONLY GIVE A CLEAR UTTERANCE OF NON-DISCRIMINATION, OR DOES THE LANGUAGE MEAN THE EMPLOYER MUST COME FORTH WITH CREDIBLE EVIDENCE TO OVERPOWER THE *PRIMA FACIE* CASE?

## V.

### Statement of the Case

#### A. Johnson's Credibility

The district court stated at 369 F. Supp. 537: "The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate". This finding was specifically affirmed by the appellate court (Pet. A. 12a).[1]

#### B. Jurisdictional Facts

A charge was filed with the EEOC by Local 69, United Automobile, Aerospace and Agricultural Implement Workers of America on April 18, 1968 at Case No. YCL9-079 (herein-

[1] References are as follows: (1) Petition Appendix (Pet. A.) followed by Page; (2) Court of Appeal's Appendix (C.A.A.) followed by Vol. (A, B, C); Page; if Transcript, Date; (3) to Record (R) followed by Date and Page; if Exhibit (Ex.) designated Plaintiffs' (Plt's), Defendant (Def.) or Stipulation (Stip.).

after "1968 Charge") (C.A.A. C 205a). The union represented approximately 750 of Johnson's production and maintenance employees. The charge was brought by the union "in behalf of the female employees" and alleged general sex discrimination by Johnson.[2] The EEOC investigated this charge only as it related to the shipping department and found probable cause to believe the charge.

Conciliation efforts began in December, 1970 (Pet. A. 5a) but were unsuccessful. On March 29, 1971, the EEOC mailed to members of the union interested in the charge a letter stating that conciliation had failed in the 1968 Charge, and that all members of the class were entitled to sue in federal district court within thirty (30) days of the receipt of the letter. Respondent (hereinafter "Ostapowicz") as a member of the class, instituted suit on April 27, 1971, within the thirty (30) days after members of the class received the EEOC "right to sue" letters. The complaint as originally filed included as an exhibit to the complaint the "right to sue" letter, wherein Ostapowicz was designated a member of the class (C.A.A. C 6a). The complaint in this action also alleged two further charges, Case Nos. TCL1-0558 and TCL1-0802. These were filed (by the specific plaintiff) Ostapowicz, in this action with

[2] The charge states:

> "Beginning on or about December 1, 1967 and continuing to date the above named employer has discriminated against female employees by laying them off and continuing them in lay off status in violation of their seniority rights while retaining and recalling male employees with less seniority to perform jobs which the women were entitled to by virtue of their seniority" (C.A.A. C 205a).

In Johnson's Petition at 1, it classifies the 1968 Charge as the "Union's 1968 Shipping Department Charge". This is incorrect and not supported by the record.



the EEOC in the fall of 1970 (hereinafter "1970 Charges").[3] The 1970 Charges related to the shipping department (C.A.A. C 181a) and the first division of Johnson (Machine Shop). (C.A.A. C 183a). The EEOC did not investigate these charges, and a "right to sue" letter on these specific charges was not included as an exhibit in the original complaint filed April 27, 1971. On May 14, 1971, Ostapowicz in accordance with the Fed. R. Civ. P., 15a, before a responsive pleading was filed, amended her complaint by enclosing the "right to sue" letters issued on May 10, 1971 by the EEOC in the 1970 Charges (Pet. A. 26a; Finding 6).

### C. Liability Facts

#### *1. General scope of sex discrimination*

Ostapowicz introduced statistical and oral evidence indicating that there was sex discrimination permeating the Johnson plant. The statistical and oral evidence involves six areas of sex discrimination, which are as follows: (a) Shipping Department (Division 4); (b) Job Classifications and Divisions with no female employees; (c) Hiring Practices; (d) Division 1; (e) Lay offs, Recalls and Terminations; and (f) Promotion and Wages.

#### *2. Shipping Department*

The evidence indicated that through 1968 no woman held a heavy packing job (C.A.A. B 11-30-72:24; R. Stip. Ex. 74). In addition, Donna Sieminowski, a witness for *Johnson* stated in uncontradicted testimony that there was severe sex discrimination in Johnson's shipping department in 1968.

[3] Both Ostapowicz and Ferrante were laid off from the shipping department. Ferrante, laid off on September 22, 1967, was never called back until 1972. Ostapowicz was laid off May 3, 1968 (C.A.A. A 5-25-71:10).

(C.A.A. B 11-30-72:284a). The EEOC decision dated August 6, 1970, indicated no female was employed as a heavy packer in the shipping department (R. Stip. Ex. 27, p. 2). Johnson introduced no testimony which contradicted the evidence which indicated that females were prevented from being heavy packers.

Donna Sieminowski, a witness for *Johnson* stated that she had been able to do a job as a heavy packer, and that she believed that all females could have done the heavy packer's job *if they were not intimidated* (C.A.A. B 11-30-72:287a). Further, Johnson's witness stated a foreman in the shipping department said he would "take every girl machine operator in the shipping department and replace them with men" if a woman became a heavy packer (C.A.A. B 11-30-72:284; Finding 44, C.A.A. C 46a).

***3. Job classifications and divisions with no female employees***

As determined by the McBee personnel cards (R. Stip. Ex. 56) supplied by Johnson and the seniority list from the years 1960 to 1972 (R. Stip. Ex. 57) there have never been any females employed in the following divisions: foundry (Div. 3); tool room (Div. 6); strip manufacturing (Div. 2); maintenance (Div. 5); patter shop (Div. 10). Evidence established that no female was ever employed as a department trucker in Division 1 through 1967 when plaintiff Bayuk was laid off (Pet. A. 27a; Finding 12), and that no female was ever employed as a mail clerk after 1960 (Pet. A. 13; Finding 13). Although the mail clerk opportunities were not great in numbers, if any of eight different females would have been called at any time to be a mail clerk by the management from the year 1967 until 1972; the females would not have had their status as employees terminated in September of 1972 (Pet. A. 28a; Finding 14).



Johnson introduced no credible evidence which contradicted the statistics concerning the lack of female employees in the above named divisions; nor did Johnson introduce evidence to show a bona fide job qualification or a business necessity as a defense to the statistics that no women occupied these various classifications or worked in these various divisions.

***4. Hiring practices***

Ostapowicz introduced statistical evidence indicating that in 1965 Johnson hired thirteen men in Division 1 and no females (Pet. A. 28a). In 1966, the statistics showed that Johnson hired 52 men in division and one female (Pet. A. 28a; Finding 16; C.A.A. C 44a).[4]

The only female hired by Johnson in 1966 was a relative of a former chief electrician of Johnson (C.A.A. B 11-30-72:25; C.A.A. A 8-12-71:110, 111). Further, William Wise, personnel manager of Johnson stated that from the years 1963 through 1966 he could recall hiring only one woman in Division 1 (Pet. A. 28a; Finding 17).

Johnson introduced no evidence which contradicted the above statistics, and Johnson introduced no evidence which showed that the hiring was due to a bona fide job qualification or a business necessity. On the contrary, from all of the evidence submitted, it is obvious that women played a major role in Division 1 for all of the previous years in the history of Johnson. Johnson kept no record of how many applicants were women in Division 1 (Pet. A. 32a; Finding 43; C.A.A. C 46a).

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[4] Witness Coella stated she was told that no married women would be hired (C.A.A. A 8-12-71:124).

*5. Division 1 (Machine Shop)*

Of the total work force employed by Johnson, Division 1 employed slightly less than fifty percent (50%) of the employees (R. 10-26-71:7). During the years 1966 to 1972, the total employment of Johnson varied from 1,100 to 604 employees (R. Plt's Exs. VV, WW, XX, YY, ZZ, AAA, BBB).

In Division 1, Johnson divided the division into four different departments—aluminum, strip bushing, thin wall bearing and brass shops. In the four different departments there were a total of 220 different machine centers (C.A.A. C 31a). The EEO-1 Reports filed by the defendant from 1966 through 1972 indicate that in the years 1966 through 1972, at a minimum, there were at least 46 women working in Division 1 (Pet. A. 28a, 29a; Finding 20). It is possible for employees in Division 1 to qualify as first class machine operators in approximately 220 machine centers although some of the machine centers may not have first and second classifications.

In the years 1960 until the end of 1972 only two female employees were classified as first class machine operators in Division 1 (Pet. A. 29a; Finding 23); however, William Wise, personnel manager of Johnson indicated that Theresa Trivilino's classification was really not first class, but it would fall more in the second class category. (C.A.A. A 10-26-71:99). Thus, one woman qualified as first class on one machine center in a twelve year program.

It was established Johnson has no formal training program to help second class operators in the first division become first class (Pet. A. 30a; Finding 30; C.A.A. C 45a).

Johnson's witnesses, Mr. Chiarini, Mr. Harrison and Mr. Park all stated that the best way to be a first class operator was to have the experience of operating a machine and observation (C.A.A. B 2-13-73:613, 614; R. 2-13-73:617, 629). It



was determined that it was difficult for any operator to go to a machine which he has not operated and become first class immediately (C.A.A. B 2-13-73:637), and it is difficult to operate one type of machine in a machine center and see another type of machine in another machine center at the same time (C.A.A. B 2-13-73:638). It was further determined that because one knows how to set up one type of machine in one machine center, this does not mean that a person can set up another machine in another machine center (Pet. A. 30a; Finding 28).

The contract between Johnson and the union stipulated that if an employee bumps another employee on a machine, the employee must be able to operate the machine immediately upon making the bump[5] (Pet. A. 30a; Finding 29).

The evidence showed that on-the-job training was the way to become a first class machine operator because Johnson had no formal training program (C.A.A. B 11-30-72:142); but women were not allowed to watch and learn (Pet. A. 30a; Finding 31). When women tried to "set-up" they were given less time than men to make the set-up (C.A.A. A 5-25-71:15, 38).

The McBee personnel cards indicate that many men were made first class operators with no experience on the machine which they were made first class (Pet. A. 30a; Finding 31), upon e.g., Donald M. Fraser bumped Norma Ferrante on April 17, 1960, at job No. 40-27.1 as a first class operator, and he had never held that job position before (R. Plt's Ex. CC). Ostapowicz presented evidence that over 11 different men were made first class operators having never held the position before—either on a bump or on bids (R. Plt's Exs. CC, EE,

[5] Johnson's witness, Dicola, admitted that from 1967 to 1971 there were no bids open (C.A.A. B 210a).

GG, HH, II, JJ, KK, LL, MM, OO, QQ, RR). Johnson made Clifford R. Brown a first class machine operator 34 days after he was hired in 1966 (R. Plt's Ex. KK) and Robert C. Donnell a first class machine operator 27 days after he was hired in 1966 (R. Plt's Ex. LL).[6]

This contrasts with the fact the claimant Norma Ferrante who was described as a "very good operator, very much interested in her job" (C.A.A. B 3-13-73:600, 607) by *Johnson's* witness, was employed at this same time by Johnson and was never made a first class machine operator in the areas where employee Brown or Donnell were made first class machine operators. After Ferrante was bumped by Frazier, she bumped William Logue on April 29, 1960, job No. 40-145.1 but was disqualified (C.A.A. C 469a [Ferrante's McBee card]).[7] This evidence indicates that Johnson arbitrarily and unfairly promoted male employees to first class machine operators when female employees who had long experience on the various machines were left as second class machine operators (Pet. A. 30a; Finding 31). Ostapowicz had four years experience on the chamfering machine, but when she wanted to bump on said machine, she was told it was foolish (Pet. A. 31a; Finding 42). The evidence indicated that the management of Johnson which determined whether or not a woman became a first class machine operator consisted solely of males (Pet. A. 31a; Finding 35).

[6] At the damage hearing Ostapowicz established that out of 550 promotions to first class for men, in 397 times the men had no prior experience. These figures did not include disqualifications (R. [Damages] Plt's Ex. 66).

[7] Ferrante tried to be first class but was disqualified April 1952, March 28, 1958; January 25, 1959, April 29, 1960, January 1964. Ostapowicz tried to qualify in 1960, 1965 and 1970. After the case was in trial, Ostapowicz made first class in February 1973, and Ash made first class in April 1973 (R. [Damages] Plt's Ex. 16A and Ex. 17A).



Johnson introduced no credible evidence which contradicted the statistics that only one woman was ever made first class during all of the years of the defendant's operation through 1972. Evidence indicated that strength was not a determinative factor in becoming a first class operator (Pet. A. 29a; Finding 25), and that females were physically capable of making set-ups (C.A.A. B. 11-30-72:172). This evidence was introduced by Johnson.

In addition to the arbitrary classifications of various men to first class machine operators, evidence established that contrary to the claim of Johnson, first class machine operators did not always set-up their own machines. In an average month, 1,600 set-ups were made by first class operators and machine setters made 1,450 set-ups (Pet. A. 30a; Finding 32). First class operators spent about 1,900 hours on set-ups, and the machine setters spent about 2,000 hours on set-ups (Pet. A. 30a; Finding 33). Evidence from Johnson's own witnesses indicated that machine setters make difficult set-ups for first class machine operators, and that set-ups on long runs are made for first class machine operators by machine setters (Pet. A. 31a; Finding 34). These facts indicate that not only has Johnson arbitrarily classified men as first class machine operators and arbitrarily kept females as second class machine operators; but in fact, Johnson has allowed first class machine operators who are male to be helped by machine setters, so that in effect, second class operators and first class operators are at many times doing the same work.

### 6. *Lay-offs, recalls and terminations*

During the years after 1967, Johnson faced a recession period, and the total employees of Johnson dropped drastically (R. Stip. Exs. VV, WW, XX, YY, ZZ, AAA,

BBB). The contract between the union and Johnson, Article XXI, page 45, paragraph 167, causes second class machine operators who are senior to first class operators to be laid off before the first class machine operators (R. Stip. Ex. 35). The contract, Article XXI, page 44, paragraph 159, states that if a bid is posted first class and there are no bidders, Johnson will change such bid to second class operator only if Johnson has a machine setter permanently assigned to the machine group (center); but Johnson is in sole control of whether or not a machine setter is permanently assigned; and it is an economic decision (C.A.A. B 2-13-73:371, 372). Johnson is also the sole agent in determining who makes first class machine operator (C.A.A. B 2-13-73:372-374). Thus, it is a management decision as to whether or not a person makes first class machine operator, and whether or not a machine setter is assigned to a certain machine group or center.

Johnson forced the women to remain as second class machine operators, and Johnson could arbitrarily decide whether or not bids were placed for jobs first or second class by determining whether or not a machine setter was permanently assigned to the machine group. If for economic reasons, Johnson would save money by not having a machine setter assigned to the machine group, then a bid would never be posted second class. Since all women who were laid off were second class, it was impossible for these second class women, who were senior to many males, to be recalled for work since 1967 because after 1967, bids were very limited (C.A.A. B 2-13-73:371, 372).[8]

Female employees who were laid off and who had not previously bumped on a certain job classification were

[8] Mr. Wise's testimony at C.A.A. A 8-12-71:118-119 indicates how Ferrante, the only first class woman, was not notified of a bid.



automatically not recalled to that classification at any time in the future because at some time in the past they had turned down a bump on a particular job (Pet. A. 32a; Finding 48).

### *7. Promotion and Wages*

Statistics were presented by Ostapowicz indicating that no women were ever promoted to machine setters, foremen, or assistant foreman (C.A.A. B 11-30-72:23, 24). Evidence indicated that the management was solely responsible for determining who was made a machine setter, assistant foreman or foreman and there were no contract provisions and no objective tests given to determine this (C.A.A. B 11-30-72:218). Evidence further indicated that all of the people in management who made these decisions were male (C.A.A. B 11-30-72:218).

Statistics were introduced which indicated that on a wage scale with the highest base wage at $4.51 per hour, no females were employed in a base wage scale of over $3.32 per hour. All of the wage scales between $3.32 and $4.51 which made up approximately one-third of the various job classifications were occupied by males (Pet. A. 31a; Findings 40, 41).[9]

Johnson introduced no credible evidence[10] to rebut the statistics concerning promotions presented by Ostapowicz and introduced no defenses such as a bona fide job qualification or business necessity to explain the lack of promotion of any females to these positions.

[9] The opinion has a misprint of $2.32 per hour.

[10] The lower court rejected the testimony of women witnesses for Johnson because of the lack of veracity; of the ten female witnesses that testified for Johnson nine had signed grievances or charges of discrimination (R. Plt's Ex. TT).

## VI.

## ARGUMENT

**A. The 1968 Charge was filed in a timely manner, Ostapowicz was a member of the class aggrieved under that charge, she received a right to sue letter under that charge and filed a federal court action acting under the statutory notice of right to sue; therefore, the jurisdictional prerequisites of a federal Title VII action have been satisfied.**

There is no conflict whatsoever in the circuits concerning the jurisdictional prerequisites of a suit under § 706-(f)(1) of Title VII of the Civil Rights Act of 1964 as amended 42 USC 2000e-5(f)(1) (hereinafter "Title VII"). There isn't any ambiguity in this Court's decision concerning the prerequisites to a Title VII suit.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) (hereinafter "Green"), this Court stated:

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 USC §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . ." *Id.* at 411 U.S. 798.

In the instant case, Ostapowicz has clearly satisfied the jurisdictional requirements. The charge, as set forth at 4,



*supra,* clearly is a broad charge of discrimination. It was filed in a timely manner. Ostapowicz received a right to sue letter under the charge and acted in federal court in a timely manner. The 1970 Charges are mere surplusage to the original charge. There is no prerequisite of reasonable cause or conciliation needed. Section 706-(e) of Title VII [now amended and replaced by § 706-(f) (1)] allowed Title VII complainants to go into federal court after a certain period of time without the EEOC taking *any* action concerning the charge. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970).

Further, this Court has stated in *Love v. Pullman Co.*, 404 U.S. 522, 92 S. Ct. 616 (1972) that Title VII prerequisites should not be interpreted in a technical fashion so as to overly burden nonlawyer aggrieved persons.

One can reason, as the appellate court did, that the 1970 Charges were filed (in the fall of 1970) before conciliation discussions took place, and Ostapowicz merely amended the original broad charge brought by the union on her behalf with more specific charges (Pet. A. 10a, 11a). However, the district court correctly applied McDonnell Douglas Corp. v. Green, *supra.*

Both the district court and the appellate court cited *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) as authority that the federal complaint must reasonably relate to the "EEOC Charge". The facts clearly indicate this to be true, and the district court has so held (Pet A. 25a; Finding 3; 34a). The appellate court has affirmed this factual determination (Pet. A. 10a).

Therefore, the jurisdictional argument of the Petitioner has been clearly decided by this Court in Green, *supra,* and the Petition should not be accepted by this Court on jurisdictional grounds.

**B. The appellate court's holding that under Green v. McDonnell Douglas Corp. once a plaintiff has established a prima facie case the burden shifts to the defendant to rebut the prima facie case by the weight of the evidence is supported by the decisions of this Court.**

In Green v. McDonnell Douglas Corp., *supra,* this Court stated that once a plaintiff has established a prima facie case of discrimination:

> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination. *Id.* at 411 U.S. 802, 803.

It is literally correct that the words "to articulate some legitimate nondiscriminatory reason" do not say that the burden of proof shifts to a defendant to rebut the prima facie case of the plaintiff by the weight of the evidence. However, the last sentence of the above quote does literally use the words "burden of proof", and it is clear that a shift of the burden is the intent of this Court from subsequent decisions of this Court.

This Court has addressed the burden of proof of a defendant in two related and analogous Title VII cases. In Franks v. Bowman Transportation Co., Inc., 423 U.S. 814, 96 S. Ct. 1251 (1976) this Court considered a defendant's burden of proof in a Title VII "Stage II" (remedy) proceeding. The Court stated:



> But petitioners here have carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the respondents and, therefore, *the burden will be upon respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.* Cf. McDonnell Douglas Corp. v. Green, 411 U.S., at 802, 93 S.Ct. at 1824, 36 L.Ed.2d., at 677, Baxter v. Savannah Sugar Refining Corp. 495 F.2d 437, 443—444 (C.A. 5), cert. denied, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974) Only if this burden is met may retroactive seniority—if otherwise determined to be an appropriate form of relief under the circumstances of the particular case—be denied individual class members. *Id.* at 96 S. Ct. 1268. (emphasis added)

Justice Brennan used the signal "Cf." in citing McDonnell Douglas Corp. v. Green. The signal indicated that McDonnell Douglas Corp. v. Green was analogous to the instant citation. The difference was that McDonnell Douglas was a Stage I (liability) proceeding rather than a Stage II (remedy) proceeding.

In another analogous situation, Albemarle Paper Company v. Moody, 422 U.S. 407, 95 S. Ct. 2362 (1975) this Court stated:

> In Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.' *Id.*, at 432, 91 S.Ct. 854. *This burden arises,* of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d

> 668. If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmenship.' *Id.*, at 801, 93 S.Ct. at 1823 *Id.* at 95 S. Ct. 2375. (emphasis added)

In this quotation, this Court used the signal "See" to again cite to McDonnell Douglas Corp. v. Green as constituting basic source material which would support shifting the burden of proof.

Not one circuit court has held that Green does not stand for shifting the burden of proof to the defendant to come forward with the weight of the evidence and disprove the prima facie case of a plaintiff.[11]

In short, the respondent has a credibility problem not a burden of proof problem. This is not a case where a defendant was not given the opportunity to rebut a plaintiff's *prima facie* case. This is a case where a defendant has no credibility. As the district court stated at 369 F. Supp. 537, Pet. A. 52a, 53a:

> While defendant has produced a large amount of testimony indicating that certain women are happy in the plant and thought that there was no discrimination and while various officials disclaimed any intention of sex discrimination, nevertheless, we weigh this evidence in

[11] *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. denied*, .... U.S. .... 95 S. Ct. 2415 (1975); *United States v. International Union of Elevator Constructors*, 538 F.2d 1012 (3rd Cir. 1976); *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 225 (5th Cir. 1974); *Peters v. Jefferson Chemical Company*, 516 F.2d 447, 450 (5th Cir. 1975); *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975); *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344, 1345 (7th Cir. 1973); *Gilmore v. Kansas City Terminal Ry. Co.*, 509 F.2d 48 (8th Cir. 1975); *Franklin v. Troxel Manufacturing Co.*, 501 F.2d 1013, 1014, 1015 (10th Cir. 1974); *Douglas v. Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975).



> the light of the principal that actions speak more loudly than words. The court frankly in the light of all the testimony in the case does not believe the disclaimers of lack of intent to discriminate."

This Court has clearly stated in analogous cases that once a *prima facie* case is presented by oral testimony or statistics in a Stage I (liability) Title VII proceeding, or once the pattern of liability discrimination has been shown in a Stage II (damage) proceeding, or once test examinations have been shown to have a disparate effect upon a minority group; the burden clearly shifts to the defendant to come forward with the weight of the evidence and overcome the *prima facie* case. In the instant case, the respondent has come forward with no evidence which has been accepted by the finder of fact. Respondent is urging this Court to overcome its lack of credibility with a play on semantics.

## VII.

## Conclusion

Both the jurisdiction and evidence questions proferred by the Petitioner have clearly been determined by this Court. This is not conflict in any circuit courts interpreting these questions. The petition should be denied.

Respectfully submitted,

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